United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1904.

No. 1396.

268

No. 16, SPECIAL CALENDAR.

JAMES N. TYNER AND HARRISON J. BARRETT,
APPELLANTS,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 16, 1904.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 18, 1904.

In the Court of Appeals of the District of Columbia.

JAMES N. TYNER ET AL., Appellants,
vs.
UNITED STATES OF AMERICA. } No. 1396.

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a Supreme Court of the District of Columbia.

UNITED STATES
vs.
JAMES N. TYNER and HARRISON J. BARRETT. } No. 23948. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 Filed in Open Court Oct. 5, 1903. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, April Term, A. D. 1903.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That by the laws of the said United States relating to the postal service of the said United States, in force before and on the first day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and thence hitherto, all letters, packets, writings, circulars, pamphlets and advertisements which were intended to aid in the execution of any scheme or artifice to defraud, devised by any person, to be effected by the use of the mails, were declared non-mailable and under said laws it was an offense against the said United States, punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months or by both such punishments for any person who had devised such
ss cheme or artifice to defraud, to place or to cause to be placed, in

the execution thereof, any of the things aforesaid in any postoffice of the said United States, to be sent or delivered by mail, or to take or receive any such things therefrom.

That by the laws aforesaid, all letters, postal cards and circulars concerning any lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under
2 false pretenses, and all lists of the drawings at any lottery or similar scheme, and all lottery tickets and parts thereof, checks, drafts, bills, money and money orders for the purchase of any tickets, or parts thereof, or of any share, or of any chance in such lottery or gift enterprise and all newspapers, circulars, pamphlets and publications of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, were non-mailable, and their carriage in or delivery through the mails prohibited; and that under said laws it was an offense against the said United States, punishable by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment, for any person to knowingly deposit or to knowingly send or cause to be sent any of the things last aforesaid, to be conveyed or delivered by mail, or to knowingly cause any of the things last aforesaid to be delivered by mail.

That upon evidence satisfactory to him that any person or company was engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance or drawing of any kind, or that any person or company was conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, the Postmaster-General was authorized by the said laws to instruct postmasters at any post-office at which letters arrived directed to any such person or company, or to an agent or representative of any such person or company, to return all such letters to the postmaster at the office at which they were originally mailed with the
3 word "fraudulent" plainly written or stamped upon the outside thereof to be by such postmasters returned to the writers thereof under such regulations as he, the said Postmaster-General might prescribe; and further in such case to forbid the payment by such postmasters to such person or company of any postal money orders drawn to the order of and in favor of any such person or company or to any agent of any such person or company, and to provide by regulation for the return to the remitters thereof of the sums named in such postal money orders.

That orders of the said Postmaster-General issued from time to time under the authority aforesaid to postmasters instructing them to so mark letters "fraudulent" as aforesaid and providing for the return of such letters to the writers thereof as aforesaid and forbidding payment by such postmasters of postal money orders as afore-

said, and providing for the return as aforesaid, of the sums named in such postal money orders to the remitters thereof, were called and became known as fraud orders; and that the necessary consequence of the issue and enforcement by the said Postmaster-General of any such fraud order against any person or company engaged in the conduct, promotion and furtherance of either of the hereinbefore mentioned schemes or artifices, lotteries or enterprises, which required for its successful operation an unobstructed use of the mails by the person or company engaged in the conduct, promotion and furtherance of the same, was the destruction of such scheme or artifice, lottery or enterprise.

That in the administrative arrangement of the business of the Post Office Department of the said United States on the day and year first aforesaid, there was, and thence hitherto has been in the said
4 department an office, designated and known as the office of the assistant attorney-general for the Post Office Department, in charge of an officer of the said United States and of the said department, designated and known as the assistant attorney-general for the Post Office Department; and that on the day and year first aforesaid and thereafter and until the twenty-second day of April in the year of our Lord one thousand nine hundred and three, one James N. Tyner was such assistant attorney-general; and that on the day and year first aforesaid and thereafter and until the first day of July in the year of our Lord one thousand eight hundred and ninety-nine, there was in the said office of the said assistant attorney-general, an officer of the said United States and of the said department, designated and known as law clerk; and that on the day and year last aforesaid and thence hitherto there has been in the said office of the said assistant attorney-general, an officer of the said United States and of the said department, designated and known as assistant attorney, who took the place and upon whom devolved the duties of the said law clerk; and that on the day and year first aforesaid and thereafter and until the said first day of July in the year of our Lord one thousand eight hundred and ninety-nine, one Harrison J. Barrett was such law clerk; and that on the day and year last aforesaid and thereafter and until the first day of January in the year of our Lord one thousand nine hundred and one, the said Harrison J. Barrett was such assistant attorney.

That as such assistant attorney-general the said James H. Tyner was charged with the duty, among other things, of giving opinions to the said Postmaster-General and to the heads of
5 the several offices of the said Post Office Department, upon questions of law arising in the course of business in the said postal service; and with the hearing and preparation of cases relating to lotteries and the misuse of the mails in furtherance of schemes to defraud the public, that is to say, with the duty of investigating in good faith, diligently and to the best of his ability the schemes and plans of business of all enterprises and concerns brought to his attention from time to time, by reference from the said Postmaster-

General, or otherwise, in the conduct, promotion and furtherance of which the mails of the said United States were being used, and which enterprises and concerns were suspected to be either schemes or artifices devised to defraud, to be effected by the use of the mails, or to be lotteries or enterprises offering prizes dependent upon lot or chance, or schemes for the distribution of money or of any real or personal property by lot or chance or drawing of any kind, or scheme devised for the purpose of obtaining money or property under false or fraudulent pretenses, or other schemes or devices for obtaining money or property of any kind through the mails, by means of false or fraudulent pretenses, representations or promises, with a view to ascertaining and determining whether or not such schemes and plans of business were in fact of any of the kinds obnoxious as aforesaid, to the laws aforesaid, and to the persons or companies engaged in the conduct, promotion and furtherance of which, the use of the mails was prohibited as aforesaid, by the laws aforesaid; and if upon such investigation it appeared to him, the said James N. Tyner, that any such scheme and plan of business last aforesaid, was obnoxious as aforesaid, to the said laws and that the use of the mails was forbidden by said laws in the conduct, promotion and furtherance
6 thereof, then and in that event to report his conclusion and opinion in the premises to the said Postmaster-General, with a statement of the facts upon which such conclusion and opinion were based, together with a recommendation that such fraud order should be issued in such case against the person or company engaged in the conduct, promotion and furtherance of such scheme and plan of business last aforesaid, to the end that such misuse of the mails by such person or company last aforesaid, might be immediately stopped through the issue and enforcement of such fraud order against them; and that as such law clerk and as such assistant attorney the said Harrison J. Barrett was charged with the duty of aiding and assisting diligently and in good faith, the said James N. Tyner as such assistant attorney-general, in the performance of the duties aforesaid; and that in the usual course of business in the said department in such cases, the said Postmaster-General, upon the submission to him of any such report, statement and recommendation of him, the said Janes N. Tyner, as such assistant attorney-general, would issue such fraud order, as recommended.

That on the third day of July in the year of our Lord one thousand nine hundred, the said Harrison J. Barrett had determined to resign and retire from his said office of assistant attorney on the thirty-first day of December in the year of our Lord one thousand nine hundred, and had theretofore agreed with a certain J. Henning *H*elms to enter into a partnership on the first day of January in the year of our Lord one thousand nine hundred and one, with him, the said J. Henning Nelms, in the practice of law and with a view to representing before the said Post Office Department and the said office of the said assistant attorney-general,

persons and companies using the mails in the conduct, pro-
7 motion and furtherance of their schemes and plans of busi-
ness, and which schemes and plans of business last aforesaid, might on the first day of January in the year of our Lord one thousand nine hundred and one and thereafter, be pending before and undergoing investigation by the said James N. Tyner, as such assistant attorney-general, with a view to ascertaining and determining whether or not such schemes and plans of business last aforesaid, were obnoxious to the laws aforesaid, and whether or not such fraud orders should be issued against them.

That during the period between the third day of July in the said year one thousand nine hundred and the first day of November in the year last aforesaid, there were pending before the said James N. Tyner, as such assistant attorney-general, the cases of certain companies, to wit: the American Investment Company of Lexington, Kentucky; the American Diamond Company, of Chicago, Illinois; the American Diamond Tontine Investment Company of Lawrence, Kansas; the Bankers' Jewelry Company of Kansas City, Kansas; the Coöperative Investment Company of Portland, Oregon; the Columbia Investment Company of Huntington West Virginia; the Colonial Investment Company of Cincinnati, Ohio; the Continental Security Company of Owensboro, Kentucky; the Diamond Contract Company of Chicago, Illinois; the Daily Investment and Home Purchasing Company of Lexington, Kentucky; the Diamond Maturity Company of Washington, of Seattle Washington; the Equitable Debenture Company of Columbus, Ohio; the Fayette Investment Company of Lexington, Kentucky; the German-American Security Company of Owensboro, Kentucky; the Gold Coast Company of Portland, Oregon; the Germania
Investment Company of Cincinnati, Ohio; the Guaranty Loan
8 and Banking Company of Dallas, Texas; the Home Guaranty and Trust Company of Detroit, Michigan; the Industrial Mutual Deposit Company of Lexington, Kentucky; the Interstate Savings Investment Company of Cincinnati, Ohio; the International Investment Company of Chicago, Illinois; the Kentucky Mutual Investment Company of Louisville, Kentucky; the Kentucky Savings Company of Lexington, Kentucky; the Lexington Investment Company of Lexington, Kentucky; the Louisville Investment Company of Louisville, Kentucky; the Michigan Debenture Company of Detroit, Michigan; the Mutual Diamond Company of Chicago, Illinois; the Mississippi Debenture Company of Jackson, Mississippi; the Mutual Fidelity Company of Baltimore, Maryland; the New Orleans Debenture Redemption Company of Louisville, Kentucky, the National Investment Company of Cincinnati, Ohio; the National Weekly Investment Company of Lexington, Kentucky; the Ohio Debenture Company of Columbus, Ohio; the Oklahoma Savings Loan and Trust Company of Guthrie, Oklahoma; the Pacific Mutual Debenture Company of San Francisco, California; the Phœnix Investment Company of Lexington, Ken-

tucky; the Southern Debenture Redemption Company of Birmingham, Alabama, the Southern Mutual Investment Company of Lexington, Kentucky; the Scottish Security Company of Louisville, Kentucky; the Standard Finance Company of Owensboro, Kentucky; the Texas Coöperative Investment Company of San Antonio, Texas; the Tontine Investment Company of Denver, Colorado; the Tontine Investment Association of Lincoln, Nebraska; the Toledo Debenture Company of Toledo, Ohio, the Tontine Loan and Security Company of Saint Louis, Missouri; the Tontine Savings Association of Minneapolis, Minnesota; the Union Central Investment Company of Lexington, Kentucky; the Union Finance and Investment
9 Company of Louisville, Kentucky; the United States Investment and Redemption Company of Cincinnati, Ohio; and the United States Mutual Investment Company of Lexington, Kentucky, and many, to wit, thirty others, the names whereof are to the grand jurors aforesaid unknown, for investigation and report to the said Postmaster-General upon the question whether or not the several schemes and plans of business of the eighty companies last aforesaid, were obnoxious to the laws aforesaid, as being either lotteries or enterprises for the distribution of money or property by lot or chance, or schemes and plans devised for obtaining money or property by false pretenses, representations or promises, matter relating to which was prohibited by the laws aforesaid from being carried or delivered through the mails.

That in respect of the question last aforesaid, such investigation had been completed and the conclusion and opinion had been reached by them, the said James N. Tyner, as such assistant attorney-general, and the said Harrison J. Barrett, as such assistant attorney, between the eighteenth day of October in the year of our Lord one thousand nine hundred and the first day of November of the same year, that the schemes and plans of business of each of the companies last aforesaid, were obnoxious to the laws aforesaid, either as being such lottery or as being such scheme, device or artifice, last aforesaid, and that matter relating to the same was prohibited from being carried or delivered through the mails by the laws aforesaid; and that thereupon and upon the reaching of such conclusion and opinion, it became and was the duty of the said James N. Tyner, as such assistant attorney-general, to report to the said Postmaster-General the con-
10 clusion and opinion so reached by them, as aforesaid, together with a statement of the evidence upon which such conclusion and opinion were based, and a recommendation to the said Postmaster-General that such fraud order should be issued by him, against the companies last aforesaid, that thereby, the issuance of such fraud order might be obtained and a continuance of the misuse of the mails by such persons and companies last aforesaid be prevented; and that it was the duty of him, the said Harrison J. Barrett, as such assistant attorney, to be rendering diligently and in good faith to the said James N. Tyner, such assist-

ance in the premises as might be within his power; but that he, the said James N. Tyner, as such assistant attorney-general, in disregard of his said duty in the premises, and by reason of the unlawful conspiracy, combination, confederation and agreement between him, the said James N. Tyner and him, the said Harrison J. Barrett, hereinafter set forth, did not submit a report on the said first day of November in the year of our Lord one thousand nine hundred or at any time before or after the day last aforesaid, to the said Postmaster-General of the conclusion and opinion so reached by him, the said James N. Tyner, together with a statement of the evidence upon which such conclusion and opinion were based and a recommendation that such fraud order should be issued against the companies last aforesaid; all and singular of which the premises and several premises aforesaid, in so far as they were then existent, were well known to the said James N. Tyner and the said Harrison J. Barrett at the time of the commission by them of the offense hereinafter set forth.

That on the said first day of November in the year of our Lord one thousand nine hundred, and at the District aforesaid, the
11 said James N. Tyner and the said Harrison J. Barrett, did unlawfully conspire, combine, confederate and agree together in contravention of their duty in the premises, not to report the conclusion and opinion aforesaid, to the said Postmaster-General, together with a statement of the evidence upon which the same were based, and with a recommendation that such fraud orders be issued by the said Postmaster-General against the companies last aforesaid so engaged in the conduct, promotion and furtherance of each of the schemes and plans of business, last aforesaid; and to submit to the said Postmaster-General an opinion as hereinafter stated, in lieu of such report, statement and recommendation last aforesaid; and to prevent so far as in them, the said James N. Tyner as such assistant attorney-general, and the said Harrison J. Barrett, as such assistant attorney, the power lay, the enforcement of the laws aforesaid, by the said Postmaster-General against the companies last aforesaid, and to keep the question of issuing such fraud orders against the companies last aforesaid, open and undetermined by him, the said Postmaster-General, until the thirty-first day of December in the year of our Lord one thousand nine hundred, and for such period of time thereafter as the said Harrison J. Barrett might desire, and in the meantime to permit the unobstructed use of the mails to the companies last aforesaid, in the conduct, promotion and furtherance of their schemes and plans of business aforesaid, to the prejudice of the said United States and the obstruction and prevention of the orderly and due administration of the said laws, and for the advancement of the pecuniary interest of the said Harrison J. Barrett, upon his retirement from the said department, as aforesaid, and the entering upon such prac-
12 tice of the law by him, the said Harrison J. Barrett, as aforesaid; which advancement of such pecuniary interest of him, the said Harrison J. Barrett, should be accomplished

in the manner following, as well as by the acts and omissions agreed upon as aforesaid, that is to say: that he, the said Harrison J. Barrett should, at some time prior to such retirement from office by him, the said Harrison J. Barrett, prepare and submit an opinion in writing to the said Postmaster-General relating to the schemes and plans of business of the companies last aforesaid, to be signed by him, the said Harrison J. Barrett, as assistant attorney and acting assistant attorney-general for the Post Office Department, which opinion should be approved in writing by the said James N. Tyner, as such assistant attorney-general, and for which opinion the approval of the said Postmaster-General in writing should be also obtained as a matter of official routine by them the said James N. Tyner, as such assistant attorney-general, and the said Harrison J. Barrett, as such assistant attorney; and that in such opinion it should be set forth and stated, in substance, that the schemes and plans of business of a number of companies to be described in said opinion as "so-called bond investment companies," the names of which should not be mentioned therein, (but to mean and intend by such description the companies in respect of whose schemes and plans of business the said James N. Tyner, as such assistant attorney-general and the said Harrison J. Barrett, as such assistant attorney had, upon such investigation as aforesaid, reached the conclusion and opinion aforesaid), had been presented to the said James N. Tyner, as such assistant attorney-general, by reference from the said Postmaster-General, or otherwise, for an expression
of opinion as to whether or not, the transmission in
13 the mails of matter relating to such schemes and plans of
business last aforesaid and the delivery of mail-matter and the payment of postal money orders to such companies last aforesaid, should be forbidden under the laws aforesaid; and that in the opinion aforesaid the schemes and plans last aforesaid should be divided into ten classes, and each of such classes be held and declared to be obnoxious to the laws aforesaid, and each such scheme and plan of business last aforesaid, be held and declared to fall within one or the other of the said ten classes, as being in each instance a lottery or a scheme to defraud, or both, and that in such opinion it should also be held and declared that the basic principle underlying the schemes and plans of business last aforesaid, was sound, and that each of them was susceptible of amendment so and in such manner as to relieve them of their objectionable features under said laws, and to entitle the companies engaged in the conduct, promotion and furtherance of the same, to the unobstructed use of the mails in such conduct, promotion and furtherance of the same, refraining however, from setting forth or stating in such opinion in what particular or in what manner such amendments might be made in any particular case, and leaving that matter open to speculation and conjecture on the part of the companies last aforesaid, and recommending that a reasonable time be given such companies last aforesaid, for the abandonment of their said schemes and plans of

business or for the making of such amendments before such use of the mails by them, the companies last aforesaid, should be interfered with by the said Postmaster-General through the issue by him of such fraud orders against them, such companies last aforesaid; they the said James N. Tyner and the said Harrison J. Barrett
14 well knowing the fact to be that in the usual course of business in the said department, the determination of what would be such reasonable time would be a matter resting with, and under the control of him the said James N. Tyner, as such assistant attorney-general; and that he, the said James N. Tyner as such assistant attorney-general would take no action against any of the companies last aforesaid, contrary to the wish and desire of him, the said Harrison J. Barrett, in that behalf; and that when the approval of such opinion by the said Postmaster General had been thus obtained, thereupon said opinion, together with such approvals thereof by the said James N. Tyner, as such assistant attorney-general, and by the said Postmaster-General, should be printed in pamphlet form, at the expense of the said United States, and sent to each of the companies last aforesaid, with a circular-letter of the said James N. Tyner, as such assistant attorney-general, calling their attention to said opinion and stating that the particular scheme and plan of business of such company last aforesaid fell within one of the said classes; and that upon such sending of such pamphlet opinion and such circular-letter to each of the said companies, as aforesaid, that the said Harrison J. Barrett should send to each of them, the companies last aforesaid, a printed announcement in which it should be stated in substance that the said Harrison J. Barrett, assistant attorney for the Post Office Department, begged to announce that he would retire from the said department on the first day of January in the year one thousand nine hundred and one, and that he would thereafter be associated with J. Henning Nelms, a member of the Baltimore bar, in the practice of law in Baltimore and Washington; in order that by said opinion in pam-
15 phlet form, said circular letter and said announcement and from the previous connection of the said Harrison J. Barrett with the said office of the said assistant attorney-general, the impression should be made on the companies receiving such opinion, circular-letter and announcement that with the exception of the said James N. Tyner he, the said Harrison J. Barrett alone knew in what particulars the schemes and plans of business of the companies last aforesaid, required amendment and the nature of the amendments so required in the said schemes and plans of business of the companies last aforesaid, to relieve such schemes and plans last aforesaid from objection under said laws and to secure for them the approval of the said James N. Tyner, as such assistant attorney-general, and to secure the companies last aforesaid, in the operation of such schemes and plans as thus amended, the unobstructed use of the mails of the said United States; and by the means and in the manner last aforesaid; and by a refusal of them the said James

N. Tyner as such assistant attorney-general and the said Harrison J. Barrett, as such assistant attorney, after such rendering and printing of such opinion, to act upon and consider during the remainder of the said year one thousand nine hundred, any application of the companies last aforesaid, for the approval by him, the said James N. Tyner, as such assistant attorney-general of any amended schemes and plans of business, which might be submitted by them the companies last aforesaid, to him, the said James N. Tyner, as such assistant attorney-general, to create the further impression on the companies last aforesaid, that it would be greatly to the interest and advantage of them, the companies last aforesaid, to employ them, the said Harrison J. Barrett and the said J. Henning Nelms,

16 rather than other attorneys and agents for the purpose of making such amendments and of obtaining such approval thereof by the said James N. Tyner, as such assistant attorney-general, to the end that the companies last aforesaid should be induced to employ the said Harrison J. Barrett to represent them before the said James N. Tyner, as such assistant attorney-general, and before the said Post Office Department in the matter of making such amendments, securing such approval and obtaining such unobstructed use of the mails for matter relating to the business of the companies last aforesaid, and to pay to him, the said Harrison J. Barrett, large sums of money for services to be rendered by him in that behalf; and that upon such employment of him, the said Harrison J. Barrett, he, the said James N. Tyner, as such assistant attorney-general, should approve any amended schemes or plans of business of the companies last aforesaid, prepared and submitted to him, by the said Harrison J. Barrett.

And so the grand jurors aforesaid upon their oath aforesaid do say, that the said James N. Tyner and the said Harrison J. Barrett in manner and form aforesaid unlawfully did conspire, combine, confederate and agree together to defraud the said United States.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, the said Harrison J. Barrett on the fifth day of December in the year of our Lord one thousand nine hundred and at the District aforesaid, did sign his name over the titles of "Assistant attorney and acting assistant attorney general for the Post Office Department" to a certain written opinion addressed to the Postmaster General, in

17 the preparation of which he the said Harrison J. Barrett had been engaged for a long time, to wit, for the period of two months and upwards prior to said last mentioned day, and which opinion is too long to be conveniently set forth herein either by way of giving its tenor, or stating its substance, but in one part of which said opinion he states in substance that by reference from the said Postmaster-General, and through other channels, the schemes and plans of business of a number of so-called bond in-

vestment companies had been presented to the office of the said assistant attorney-general for the Post Office Department, for an expression of opinion as to whether or not the transmission in the mails of matter relating thereto, and the delivery of mail matter, and the payment of postal money orders, should be forbidden by the Post Office Department under certain laws of the United States therein mentioned, and in other parts of said opinion he, the said Harrison J. Barrett, states in substance that in the consideration of the said question, the various plans and schemes of business used by the companies last aforesaid were grouped as nearly as possible into classes, and that he had omitted all reference to any company by name, and had found that the schemes and plans last aforesaid of the companies last aforesaid were either lotteries or similar enterprises for the distribution of prizes by lot or chance, or were fraudulent within the meaning of the statutes forbidding the use of the mails in the promotion of such enterprises, nevertheless, that if changed and modified in some of their features, they would not be objectionable to the laws aforesaid, in their operation and conduct, and that he recommended that a reasonable time should be allowed to the companies last aforesaid, for the abandonment of their said schemes and plans of business after their attention had been
18 called to the necessity of modifying the same, or for making such changes as would eliminate therefrom all objectionable features, before action should be taken by the said Postmaster-General to deprive them of the use of the mails.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said James N. Tyner on the seventh day of December in the said year one thousand nine hundred, and at the District aforesaid, did endorse his approval in writing upon the said opinion, as assistant attorney-general for the Post Office Department.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett as such assistant attorney, and the said James N. Tyner, as such assistant attorney-general, did on the eighth day of December in the year of our Lord one thousand nine hundred, prepare a letter for the signature of Charles Emory Smith, as Postmaster General, approving the said opinion, and did procure the signature thereto of the said Charles Emory Smith, who was then Postmaster General.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett and the said James N. Tyner did, on the fifteenth day of December in the year of our Lord one thousand nine hundred, and at the District aforesaid, procure the printing in pamphlet form at the Government Printing Office, of five hundred copies of the said opinion.

And that in further pursuance of the said unlawful con-
19 spiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett, as such assistant attorney, and the said James N. Tyner, as such assistant attorney-general, did on the said fifteenth day of December, in the year of our Lord one thousand nine hundred, send by mail from the District aforesaid to the Southern Mutual Investment Company, at Lexington, Kentucky, one of the said printed copies of said opinion together with a printed circular, dated on the day last aforesaid, signed by the said James N. Tyner as assistant attorney-general for the Post Office Department, advising the said company that its scheme and plan of business fell within one of the classes mentioned in the said opinion.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett did on the day and year last aforesaid, send by mail from the said District to the said Southern Mutual Investment Company, at said Lexington, Kentucky, a card upon which was printed an announcement of the tenor following, that is to say:

"Mr. Harrison J. Barrett, assistant attorney for the Post Office Department, begs to announce that he will retire from the department on January 1, 1901, and that he will thereafter be associated with Mr. J. Henning Nelms, a member of the Baltimore bar, in the practice of law in Baltimore and Washington, with offices in the Calvert building, rooms 909–919, Baltimore, Md.

Washington, D. C. December 10, 1900."

And that in further pursuance of the said unlawful con-
20 spiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett, as such assistant attorney, and the said James N. Tyner, as such assistant attorney-general, on the said fifteenth day of December in the year of our Lord one thousand nine hundred, did send by mail from the District aforesaid to each of the other companies hereinbefore mentioned by name, one of the printed pamphlets aforesaid, together with a printed circular, signed by the said James N. Tyner, as such assistant attorney-general, advising the said companies respectively that their schemes and plans of business fell within one of the classes mentioned in said opinion.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett did on the day and year last aforesaid, and from the District aforesaid, send by mail to the companies last aforesaid, mentioned by name, a card with an announcement printed thereon of the tenor above set forth.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said Harrison J. Barrett did, on the twentieth day

of December in the said year one thousand nine hundred, write and sign a certain letter, which he marked personal, and addressed to J. P. Williams, at Louisville, Kentucky, who was then president of the New Orleans Debenture Company, at Louisville, Kentucky, one of the companies aforesaid, and did send the said letter by mail to the said J. P. Williams, which letter and a postscript thereto are of the tenor following, that is to say :

21 "Personal.

(M W B)

WASHINGTON, *Dec.* 20, 1900.

Mr. J. P. Williams, Louisville, Ky.

MY DEAR SIR: I have received your favor of the 17th inst.,

This is written at home, and as I have not your contracts at hand I cannot answer you specifically in regars to your 25% and 15% debentures, though from my recollection the principles involved are the same as in other contracts set out in the opinion. I will however ask Gen'l Tyner, the assistant attorney general, to write you specifically on these points.

While my work at the department has practically ceased yet my official connection will not be severed until Dec. 31, so that I would not feel at liberty to discuss ways and means with you. My associate and I will be pleased to act as your attorneys after Dec. 31, and you could of course correspond with Mr. Nelms now. I believe we can eliminate all the objectionable features in the contracts, and put them in such form that they will meet with the approval of the department. Our fee would be one thousand dollars retainer, and one hundred dollars a month for twelve months. I suggest this latter provision, inasmuch as during the coming year details may have to be adjusted, and new features and improvements in contracts will suggest themselves for consideration and submission to the department. We would render you any service that might be necessary in this connection, and communicate to you whatever we might learn of advantage to your company.

I may add for your information that the department does not intend to interfere with the operations of any company until they have had reasonable opportunity to perfect and present new forms of contract which will be approved.

I am, very truly yours,

HARRISON J. BARRETT.

P. S.—Our offices will be in the Calvert building, Baltimore, though within a short time we may have a branch here. Baltimore, as you know, is only 45 minutes by train from Washington, and telephone connections make them practically one city."

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the

object thereof, the said Harrison J. Barrett did on some day in the month of December in the said year one thousand nine hundred, and between the first and twenty-fifth days of the said month, and which is not more particularly known to the grand jurors aforesaid,
22 enter into an agreement in writing with the said J. Henning Nelms, whereby the said J. Henning Nelms, obligated himself to pay and turn over to the said Harrison J. Barrett during the law partnership between them, all of a salary of two thousand dollars per annum which he, the said J. Henning Nelms was entitled to receive from the said Mutual Fidelity Company of Baltimore, Maryland, as the general counsel of the company, last aforesaid.

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said James N. Tyner and the said Harrison J. Barrett, did purposely retain in the said office of the said assistant attorney-general, without action thereon, a certain report of Frank E. Little, a post office inspector, made to the said Post Office Department, stating in substance that upon an investigation by him, the said Frank E. Little as such inspector, he, the said Frank E. Little had found that the said Mutual Fidelity Company of Baltimore, Maryland, was a scheme to defraud, operated by the use of the mails, and further stating that the United States district attorney at said Baltimore, advised that the said company be called upon by the assistant attorney-general for the Post Office Department to show cause why a fraud order should not be issued against the said company, which report was referred to the said James N. Tyner, as such assistant attorney-general, by the said Post Office Department and received by him, the said James N. Tyner, on the twenty-third day of November, in the said year nineteen hundred.

That on the eighteenth day of December, in the year of our Lord one thousand nine hundred and at the District aforesaid, one Charles
23 J. Bronston and one A. Smith Bowman, called at the office of the assistant attorney-general for the Post Office Department, and there saw the said Harrison J. Barrett and there informed him, the said Harrison J. Barrett, that he, the said Charles J. Bronston was the second vice-president of the Southern Mutual Investment Company, and that he, the said A. Smith Bowman was the secretary and general manager of the same company, and that the said company had been advised by the said assistant attorney-general that the present scheme and plan of business of the said company fell within one of the classes mentioned in the said opinion of the fifth day of December in the said year one thousand nine hundred, for which reason, the use of the mails of the said United States was forbidden to it in the prosecution of its business, and that they the said Bronston and the said Bowman, were agents and representatives of the said company, and had called for the purpose of ascertaining in what particulars it would be necessary to amend the company's said scheme and plan of business so as to relieve it

from the charge made by the department that it was obnoxious to the postal laws, and to entitle it to an unobstructed use of the mails in the prosecution of its said business; and that thereupon, then and there, to wit, on the said eighteenth day of December in the year last aforesaid, and at the District aforesaid, and at the office of the said assistant attorney-general, the said Harrison J. Barrett did, in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, state to the said Charles J. Bronston, and the said A. Smith Bowman, that the connection of him, the said Harrison J. Barrett with the said office of him, the said James N. Tyner, assistant attorney-general, would cease on the thirty-first day of December next
24 and that in the meantime, he would not take up for consideration or give official attention to such or similar matters.

And that thereupon and on the eighteenth day of December in the year of our Lord nineteen hundred and at the District aforesaid, the said Charles J. Bronston and the said A. Smith Bowman, called on the said James N. Tyner, assistant attorney general, at his office, and stated to him, that they respectively were officers of the said company, as aforesaid, and that they desired to be informed as aforesaid; whereupon, then and there, to wit, at the time and place and office last aforesaid, the said James N. Tyner in further pursuance of the said unlawful conspiracy, combination, confederation and agreement and to further effect the object thereof, did state to them that he would not take up for consideration and determination such matters until after the first day of January, of the year of our Lord one thousand nine hundred and one.

And that thereupon and by reason of the fact that the said last mentioned company had received the printed pamphlet opinion and circular letter and the said announcement, that on and after the said first day of January in the said year one thousand nine hundred and one, the said Harrison J. Barrett would be associated in the practice of the law with the said J. Henning Nelms; the said Charles J. Bronston and A. Smith Bowman, in the evening of the eighteenth day of December in the year of our Lord nineteen hundred, did call upon the said J. Henning Nelms in the said city of Baltimore, and did then and there and upon the occasion last aforesaid, enter into an agreement with the said J. Henning Nelms, to pay to him, the said J. Henning Nelms, one thousand dollars in case he, the said J. Henning Nelms procured the immediate approval by the said James N. Tyner and the
25 said Harrison J. Barrett, as such assistant attorney-general and such assistant attorney, respectively, of such amendments to the existing plan and scheme of business of the said company, as would enable the said company to continue their business and to enjoy the unobstructed use of the mails in the conduct thereof, and that on the day following, to wit, on the nineteenth day of December in the said year one thousand nine hundred, the said J. Henning Nelms in company with the said Charles J. Bronston and the

said A. Smith Bowman, did come to the city of Washington, and the said J. Henning Nelms, having arranged with the said James N. Tyner, for another interview with him the said James N. Tyner, in the afternoon of the said day, the said J. Henning Nelms, the said Bronston and the said Bowman, did, on the afternoon of the day last aforesaid, call upon the said James N. Tyner, and that the said J. Henning Nelms did then and there and upon the occasion last aforesaid submit an amended scheme and plan of business for the company last aforesaid, to the said James N. Tyner, as such assistant attorney-general, for his approval, and that the said James N. Tyner, as such assistant attorney-general, in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, did then and there—to wit, on the day and year and occasion last aforesaid, state as such assistant attorney-general, that he approved such amended scheme and plan of business last aforesaid.

And that on the twentieth day of December in the said year one thousand nine hundred, and at the District aforesaid, and in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof,
26 the said Harrison J. Barrett did prepare and hand to the said James N. Tyner, a typewritten memorandum in relation to the amended scheme and plan of business last aforesaid, of the company last aforesaid, for the use of him, the said James N. Tyner, as such assistant attorney-general, in preparing a letter approving the amended scheme and plan of business last aforesaid, to be signed by him, the said James N. Tyner as such assistant attorney-general, which said memorandum is of the tenor following, that is to say:

"This contract provides substantially:

(1.) That the company shall issue a contract, to which *is* attached three coupons upon the payment of $4.00, and 50 cents a month thereafter on each unredeemed coupon for 141 months:

(2.) Forty per cent. of the receipts go into aredemption fund and have no earning power; ten per cent. are used for expenses, ten per cent. go into the equation or loading fund, which is invested and presumably held for the protection of investors; and forty per cent. goes into a reserve fund which is invested and applied to the redemption of all unredeemed coupons at the end of 141 months. The sole duty of the reserve fund is to earn sufficient to replace the amount taken out for expenses, and the equation or loading fund, which is also an earning factor, would also if necessary contribute to this purpose. It is self evident that the reserve and equation funds can do the work demanded of them, and that the plan is in nowise fraudulent on its face.

(3.) The holder of a certificate is to be paid at maturity the amount paid thereon, and his *pro rata* share of any surplus and accumulations, which have been derived from interest earnings of the

reserve and equation funds, (after replacing the amount used for expenses), lapses, surrenders, etc.

(4.) The redemption fund is to be used for the prior redemption of coupons in numerical order, so far as the fund will admit, and the value of a coupon is to be the amount paid thereon, and its *pro rata* share of the earnings and surplus. This it is presumed will be ascertained by assigning to each coupon in force at the end of each month its *pro rata* share of the earning- and accumulations for that month after deducting the amount allowed for expenses. In this way the liabilities can never exceed the assets, and when a coupon is called in its value is ascertained by determining the amount paid thereon, and the earnings credited thereto during each successive month the coupon has been in force. There can be no chance whatever in this early redemption for each coupon regularly receives its *pro rata* share of whatever the surplus and earnings may be, and even if the method of redemption is by chance it would not be a lottery scheme for no prize is awarded. It may be suggested that the holder of coupons that are not called for early redemption, and run to maturity receives a prize, for as the company enlarges its business the surplus and accumulations
27 will increase. This may be, though it would not affect the character of the scheme, but in order to even obviate this inequality it is understood that the company gives the holder of a coupon called for early redemption the opportunity to elect to continue until the final maturity period and thus it is optional with him whether he will retire with his earnings to date or stay in and share in the total distribution.

The plan is perfectly feasible for the company really promises nothing but to replace the amount of ten per cent. taken out for expenses, which can easily be done out of the earnings of the reserve and equation funds. Each contract holder is simply to receive his *pro rata* of whatever surplus there may be.

The scheme is not a lottery for there is no prize, each holder of a coupon called for early redemption merely receiving what he has paid thereon and its *pro rata* earnings etc. to date. And the privilege of electing to continue until the final redemption period removes even a semblance of a prize to the last certificate holders.

It is unnecessary to refer to any of the provisions of the contract as to lapse, surrender, loans, etc. for these have nothing to do with the general character of the scheme."

And that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object thereof, the said James N. Tyner, as such assistant attorney general, did, on the twenty-first day of December, in the said year one thousand nine hundred, and at the District aforesaid, prepare and sign a certain letter in which *was* incorporated the terms of the said memorandum, which letter last aforesaid was of the tenor following, that is to say:

"Office of the assistant attorney general for the Post Office Department, Washington.

JANUARY 8, 1901.

The Southern Mutual Investment Co., Lexington, Ky.

GENTLEMEN: Referring to the contract which is construed to mean a plan upon which your company is to continue its business hereafter (and which was filed in this office for consideration under date of December 19, 1900) I make response thereto as follows:

This contract provides substantially—

(1.) That the company shall issue a contract to which *is* attached three coupons, upon the payment of $4.50 per month
28 thereafter on each unredeemed coupon for the full period of 141 months.

(2.) Forty per cent. of the receipts go into the redemption fund and have no earning power; 10 % are used for expenses; 10 % go into the equation or loading fund, which is invested and presumably held for the protection of investors; and 40 % goes into the reserve fund which is invested and applied to the payment of all unredeemed coupons at the end of 141 months. The sole duty of the reserve fund is to earn a sufficient amount to replace the amount taken out for expenses, and the equation or loading fund, which is also an earning factor, would, if necessary, contribute to this purpose. It is self-evident that the reserve and equation funds can do the work demanded of them, and that the plan is in no wise *fraudulent on its face;*

(3.) The holder of a certificate is to be paid at maturity the amount paid thereon and his *pro rata* share of any surplus and accumulations which have been derived from interest-earnings of the reserve and equation funds (after replacing the amount used for expenses, lapses, surrenders, etc.);

(4.) The redemption fund is to be used for the prior redemption of coupons in numerical order, so far as the fund will admit, and the value of a coupon is to be the amount paid thereon and its *pro rata* share of the earnings and surplus. These, it is presumed, will be ascertained by assigning to each coupon in force at the end of each month its *pro rata* share of the surplus and accumulations for that month, after deducting the amount allowed for expenses. In this way, the liabilities can never exceed the assets, and when a coupon is called in, its value is ascertained by determining the amount paid thereon and the earnings accredited at the rate during each successive month the coupon has been in force. Thus, it would seem that there is no prize whatever in this early redemption, for each coupon regularly receives its *pro rata* share of whatever surplus and earnings there may be; and even if the method of redemption is by chance, it would not be a lottery scheme, inasmuch as no prize is awarded. It may be suggested that the holders of coupons that are not called in for early redemption, and which run to maturity, receive a prize, for, as the company enlarges its

business the surplus and accumulations will increase. This may be, although it would not affect the character of the scheme; but in order to obviate this inequality, it is understood that the company gives the holder of a coupon called for early redemption the privilege of electing to continue it until the final maturity period—and thus it is optional with him whether he will retire with his earnings today, or stay in and share in the total and final distributions.

The plan is feasible, for the company really promises nothing but to replace the amount of 10 % taken out for expenses, which can easily be done out of the earnings of the reserve and equation funds. Each contract holder is simply to receive his *his pro rata* of whatever surplus there may be.

The scheme is not a lottery, for it offers no prize, each holder of a coupon called for early redemption merely receiving what he has paid thereon and its *pro rata* earnings, etc., to date; and the privilege of electing to continue until the final redemption period removes all semblance of a prize to the last certificate holders.

29 It is unnecessary to refer to any of the provisions of the contract as to lapses, surrender, loans, etc., for these have nothing to do with the general character of the scheme.

Very respectfully, JAS. N. TYNER,

Assistant Attorney General for the Postoffice Department."

And that on the twenty-first day of December in the said year one thousand nine hundred, a certain George W. Morgan, who was then the president of the Continental Security Redemption Company, of Birmingham, in the State of Alabama, came to the city of Washington and saw the said Harrison J. Barrett at the office of the said James N. Tyner, assistant attorney-general, and then and there and upon the occasion last aforesaid, stated to him, the said Harrison J. Barrett that he, the said George W. Morgan was such officer of said company, and had come to the city of Washington as the agent and representative of the said company for the purpose of ascertaining whether or not a scheme and plan of business for the said company would be approved by the said James N. Tyner, as such assistant attorney-general, which he, the said Morgan then desired to submit to him, the said Harrison J. Barrett as such assistant attorney, and which scheme and plan of business he, the said George W. Morgan then and there and upon the occasion last aforesaid, further stated to him, the said Harrison J. Barrett to be the then existing scheme and plan of business of the said company amended in certain particulars designed to relieve it from objection under the said printed pamphlet opinion of the said assistant attorney-general; and thereupon then and there and upon the occasion last aforesaid, and in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further effect the object

30 thereof, the said Harrison J. Barrett did enter into an agreement with the said George W. Morgan whereby, for and in

consideration of the sum of eight hundred dollars to be paid to him, the said Harrison J. Barrett by the said company after the first day of January in the said year one thousand nine hundred and one, he, the said Harrison J. Barrett would procure the approval by the said James N. Tyner, as such assistant attorney general of such scheme and plan of business for the said company as would be satisfactory to the said company, and in the meantime to protect the said company from interference by the said Postmaster-General in its use of the mails.

And that on the third day of January, in the year of our Lord one thousand nine hundred and one, a certain Charles A. Spenny, who was then the president of the said Equitable Debenture Company, of Columbus, Ohio, came to and was in the city of Washington for the purpose of obtaining information from the said James N. Tyner, assistant attorney-general, as to the particulars in which it would be necessary to amend the existing scheme and plan of business of the said company, so as to relieve it from the objection of being obnoxious to the postal laws of the said United States, and to secure to it the free and unobstructed use of the mails in the prosecution of its business, and that on the day and year last aforesaid, he called at the office of the said James N. Tyner, assistant attorney-general, and there saw him, the said James N. Tyner, and informed him that he, the said Spenny was such officer of said company and its agent and representative for the purposes aforesaid, whereupon, and in further pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to further ef-
31 fect the object thereof, the said James N. Tyner, as such assistant attorney-general did then and there and upon the occasion last aforesaid, state to him, the said Charles A. Spenny, that it would facilitate the disposition of the matter which he, the said Spenny had in mind if the said company would employ an attorney familiar with that kind of business to attend to the same, and did then and there and upon the occasion last aforesaid, recommend the employment of him, the said Harrison J. Barrett by the said company, as such attorney, and that thereupon, then and there, to wit, on the day and year last aforesaid and at the District aforesaid, the said Charles J. Spenny on behalf of the said company did employ the said Harrison J. Barrett, as its attorney and agreed to pay him a fee of five hundred dollars for obtaining the approval by the said James N. Tyner, as such assistant attorney-general, of a scheme and plan of business satisfactory to the said Charles A. Spenny, and thereupon and in pursuance of such advice, and on the fourth day of January in the year last aforesaid, the said Harrison J. Barrett, as attorney of said company, and in company with the said Charles A. Spenny, did call upon the said James N. Tyner, at his office, and submit to him for approval a scheme and plan of business for the said company, which was the then existing scheme and plan of business, amended in certain particulars; and that in further pursuance of the said unlawful conspiracy, combination, con-

federation and agreement, and to further effect the object thereof, the said James N. Tyner did then and there and upon the occasion last aforesaid, prepare and sign a letter approving the said amended scheme and plan of business last aforesaid, without examining the same, and upon the mere verbal assurance of the said Har-
32 rison J. Barrett that the same was free from objection, and not obnoxious to the said laws of the said United States relating to the said postal service.

Against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

MORGAN H. BEACH,
Attorney of the United States in and for the District of Columbia.

(Endorsed :) No. 23948. United States *vs.* James N. Tyner and Harrison J. Barrett. Violation of section 5440 R. S. U. S. as amended. Witnesses: J. P. Williams, A. S. Bowman, J. E. Tappan, Charles A. Spenny, S. A. Stevens, Walter F. Brown, George W. Morgan, R. M. Webster, Robert M. Fulton. A true bill, A. M. McLachlen, foreman.

33 *Demurrer to Indictment.*

Filed December 4, 1903.

In the Supreme Court of the District of Columbia.

UNITED STATES
vs.
HARRISON J. BARRETT and JAMES N. TYNER. } No. 23948, Criminal Docket.

The defendants say that the indictment and each count thereof is bad in substance.

A. S. WORTHINGTON,
Of Counsel for Defendants.

Among the matters of law to be argued in support of the foregoing demurrer are:—

1. While the indictment charges a conspiracy to defraud the United States, it does not appear how the alleged conspiracy could operate to defraud the United States.

2. The only specific charge made against the defendants is a mere conclusion of law.

3. The facts averred, if true, do not constitute a violation of any law.

4. The defendants are not given such a description of the charge made against them as will enable them to make their defense, or avail themselves of a conviction or acquittal against a further prosecution for the same cause, nor is the court sufficiently informed as to enable it to decide whether the facts alleged
34 are sufficient in law to support a conviction, if one should be had.

5. The indictment and each count thereof is in other respects uncertain and insufficient.

A. S. WORTHINGTON,
Of Counsel for Defendants.

To Morgan H. Beach, Esq., attorney of the United States for the District of Columbia:

Please take notice that I shall call up the above demurrer in criminal court No. 1, on Friday, December 11th, 1903, at the opening of the court, or as soon thereafter as counsel can be heard.

A. S. WORTHINGTON,
Of Counsel for Defendants.

Service of copy of the foregoing demurrer and notice acknowledged this fourth day of December, 1903.

MORGAN H. BEACH,
U. S. Att'y, D. C.,
By HUGH F. TAGGART.

35 Supreme Court of the District of Columbia.

WEDNESDAY, *December* 23, 1903.

The court resumes its session pursuant to adjournment, Mr. Justice Pritchard, presiding.

* * * * * * *

UNITED STATES *vs.* JAMES N. TYNER and HARRISON J. Barrett.	No. 23948. Indicted for Violation Section 5440, R. S. U. S.

Come as well the attorney of the United States as the defendants by their attorneys Messrs. A. S. Worthington, O. F. Hershey and Robert Crain; whereupon the defendants' demurrer to said indictment coming on to be heard and argued by counsel, it is submitted to the court for consideration.

Supreme Court of the District of Columbia.

MONDAY, *January* 4, 1904.

The court resumes its session pursuant to adjournment, Mr. Justice Pritchard, presiding.

UNITED STATES
vs.
JAMES N. TYNER and HARRISON J. Barrett.

No. 23948. Indicted for Violation of Section 5440, R. S. U. S., as Amended.

Come as well the attorney of the United States as the defendants by their attorney, A. S. Worthington, Esq., and, thereupon, the defendants' demurrer to the indictment having been heretofore
36 argued and submitted to the court, it is considered by the court that said demurrer be and it hereby is overruled.

37 *Order Allowing Special Appeal.*

Filed January 14, 1904.

Court of Appeals of the District of Columbia.

No. 177, Original Docket. January Term, 1904.

HARRISON J. BARRETT and JAMES N. Tyner
vs.
UNITED STATES.

No. 23948, Criminal Docket.

In view of the special circumstances of this case, and without intending to make a precedent to be followed in subsequent cases, we have concluded to allow the special appeal as prayed, and it is so ordered.

January 13, 1904.

R. H. ALVEY,
Chief-Justice.
M. F. MORRIS,
Associate-Justice.

A true copy,

Test:

[SEAL.] HENRY W. HODGES, *Clerk.*

38 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 37, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 23,948, criminal, United States *vs.* James N. Tyner *et al.*, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of January, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1396. James N. Tyner *et al.*, appellants, *vs.* United States of America. Court of Appeals, District of Columbia. Filed Jan. 16, 1904. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

JANUARY TERM, 1904.

No. 1396.

No. 1397.

JAMES N. TYNER AND HARRISON J. BARRETT,
APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES, APPELLEE.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.
CHARLES A. KEIGWIN,
Assistant United States Attorney.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9901

Court of Appeals, District of Columbia.

JANUARY TERM, 1904.

No. 1396.

No. 1397.

JAMES N. TYNER AND HARRISON J. BARRETT,
APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES, APPELLEE.

STATEMENT.

The indictments in the two cases above entitled are identical in substance and language, except that each charges a different offense predicated upon the facts alleged. In No. 1396 the charge is of conspiracy to defraud the United States, and in No. 1397 the charge is of conspiracy to commit the offense of misconduct in office.

The first four paragraphs of each indictment recite the Federal statutes prohibiting the use of the mails for the transmission of lottery and fraudulent matter, the authority

of the Postmaster General to deny the use of the mails to persons and concerns engaged in conducting lotteries and fraudulent schemes, and the practice of exercising this authority by means of what are called fraud orders.

Paragraph 5 shows that on June 1, 1897, and thereafter until April 1, 1903, the defendant James N. Tyner held the office, created by statute, of Assistant Attorney General for the Post-Office Department, and that the defendant Harrison J. Barrett held the office, also of statutory creation, known first as that of law clerk and afterwards as that of assistant attorney in the office of the Assistant Attorney General for the Post-Office Department.

Paragraph 6 sets out and avers the respective duties of the said defendants in the offices named, charging that it was incumbent upon them to investigate and report upon such cases relating to the use of the mails by lotteries and fraudulent concerns as were brought to their attention "by reference from the said Postmaster General or otherwise," and in cases where they found that such use of the mails was unlawful, to make report in the premises, recommending the issue of fraud orders to the end that such misuse of the mails should be immediately stopped. It is further alleged that in the usual course of business at the Post-Office Department fraud orders would be issued in accordance with such recommendations.

Paragraph 7 avers that on July 3, 1900, the defendant Barrett had determined to retire from his said office and to form a partnership with one Nelms for the purpose of representing before the Post-Office Department and the said office of the Assistant Attorney General such persons, companies, and concerns as might be under investigation by the Assistant Attorney General.

Paragraph 8 shows that between July 3, 1900, and the first of November following, there were pending before the Assistant Attorney General the cases of eighty companies for investigation and report to the Postmaster General upon

the question whether or not their several schemes were obnoxious to the postal laws above recited.

Paragraph 9 charges that the two defendants had, on November 1, 1900, reached the conclusion that all of the schemes and plans of business of said companies mentioned in the last paragraph were obnoxious to the postal laws aforesaid, as being either lotteries or schemes to defraud, and that therefore they were not entitled to the use of the mails, and that thereupon it became and was the duty of the defendant Tyner to report to the Postmaster General his said conclusion, and to recommend the issue of fraud orders against the said companies, and it became and was the duty of the defendant Barrett to render, diligently and in good faith, to the said Tyner such assistance as was within his power.

But, it is averred, the said defendants, in disregard of their duties in the premises and by reason of a certain unlawful conspiracy below set forth, failed and omitted to make such report.

In paragraph 10 the fact of this unlawful conspiracy is directly charged and its character is set out. The averment is that "the said James N. Tyner and the said Harrison J. Barrett did unlawfully conspire, combine, confederate and agree together, in contravention of their duty in the premises," to do these things:

(*a.*) Not to report to the Postmaster General the conclusion aforesaid reached by them, that the companies mentioned were not entitled to the use of the mails, with a recommendation that fraud orders be issued against such companies.

(*b.*) To submit, in lieu of such report, an opinion such as is below set forth, which opinion was to be calculated to further their scheme of private profit.

(*c.*) To prevent, so far as they, the said defendants, were able, the enforcement of the postal laws which, in their judgment, were applicable to the said companies.

(*d.*) To keep open the question of issuing fraud orders against the said companies until after the 1st of January, 1901.

(*e.*) In the meantime to permit to the said companies the free and unobstructed use of the mails, "to the prejudice of the said United States and the obstruction and prevention of the orderly and due administration of the said laws, and for the advancement of the pecuniary interest of the said Harrison J. Barrett upon his retirement from the Department, as aforesaid, and the entering upon such practice of the law by him, the said Harrison J. Barrett."

The indictment then proceeds to set out the manner in which the advancement of Barrett's pecuniary interest was to be attained. An opinion was to be prepared by Barrett to the effect that the schemes of all the companies mentioned were obnoxious to the postal laws; that such schemes were, however, susceptible of amendment so as to relieve them of objectionable features and entitle the companies to the use of the mails, and that a reasonable time should be allowed the companies for making such amendments. To this opinion the approval of the Postmaster General should be obtained as a matter of official routine, and the opinion should then be published and distributed as a public document. In the opinion no hint was to be given as to the manner or particulars in which the suggested amendments should be made, but the impression should be created that the defendant Barrett knew what amendments were necessary to satisfy the Assistant Attorney General. Simultaneously with the transmission of the copies of this opinion to the persons and companies concerned, cards should be sent to the same persons announcing

that Barrett had resigned his official position in the Post-Office Department and was prepared to represent such persons and companies in their business before that Department. It is further alleged that by the refusal of defendant Tyner to act upon any application of the companies aforesaid for approval of their schemes before January 1, 1901, the impression should be created that it would be greatly to the interest and advantage of such companies to employ Barrett and his partner, Nelms, as attorneys, and that defendant Tyner, as Assistant Attorney General, would approve such amended schemes as should be prepared and submitted by the defendant Barrett, and in the meantime the concerns so found to be fraudulent should be allowed the free use of the mails, in violation of said laws.

Upon these averments the grand jurors charge, in the one case, that the defendants conspired to defraud the United States, and in the other that they conspired to commit the offense of misconduct in office.

The indictments then proceed to set out a number of acts done in pursuance of the conspiracy alleged, which acts are amply sufficient to satisfy the demands of the statute.

It will be observed that each indictment falls into three parts:

1st. A series of introductory averments, setting out the situation in which the defendants found themselves at the time of the wrongdoing charged and explaining how such wrongdoing became possible and why it was criminal;

2d. A paragraph, the tenth, in which the offense is laid and its character and contents stated; and,

3d. Allegations of overt acts done in pursuance of the conspiracy charged.

Upon these indictments numerous questions are raised by the demurrants, which may be divided into two general

classes: First, questions as to the sufficiency of various averments in point of technical correctness as matters of criminal pleading; and, second, questions as to the sufficiency of the facts alleged, as matters of substantive law, to constitute the offenses imputed to the defendants and to warrant the conclusions of criminality drawn by the grand jury.

ARGUMENT.

I.

In considering the technical sufficiency of the indictments, a distinction is to be observed between those averments, on the one hand, which set out and describe the offense intended to be charged, and, on the other hand, those averments which merely recite the facts by reason of which the offense was made possible or state the circumstances which made the alleged conduct of the defendants criminal.

"The doctrine is, that an averment which is incidental, as being introductory or collateral, or an inducement to something else, need not be set down in the indictment either so much in detail or with such directness as those parts are required to be which constitute the gist of the offense. * * *

"Circumstances which make an act an offense are distinguishable from the act.

"Thus, an indictment against a constable for not returning a warrant may aver that, whereas a third person named was convicted so and so, and whereas a warrant was issued and the like, because this is inducement; but when it comes to lay the non-feasance itself—the main charge—its language must be direct. * * *

"Moreover, the inducement need not be set out with all the minuteness or certainty of time and place required for the main charge."

1 Bishop Criminal Procedure, secs. 554, 555.

An examination of the indictments with reference to the distinction thus taken discloses that in each case the offense

is laid in the tenth paragraph of the indictment, while the first nine paragraphs consist of matters of inducement, averments introductory and explanatory, intended to lead up to and cast light upon the main charge.

While it does not appear to counsel for the Government that any portion of the indictments stands in need of any lax indulgence, it may be well, and it is only just, to bear in mind this diversity in the character and purpose of the different divisions of the pleadings. As to the tenth paragraph, of course it is requisite that it should enumerate all the several facts and circumstances essential as components of the offense laid, and it must lay such facts directly and clearly, without aid from inference or intendment. The purpose of the first nine paragraphs, on the other hand, is merely to set out the condition of affairs which made the offense possible and to state the facts which are requisite to develop the criminality of the acts charged in the tenth paragraph. In other words, these introductory averments relate to the circumstances which make the act alleged criminal, and which are distinguishable from the act itself.

Upon the principle already stated, the pleader, in his inducement, was entitled to avail himself, to a certain extent, of natural and proper intendments, and to claim the advantage of such reasonable implication and necessary intendments as might inhere in his general allegations. For example, having averred, as in paragraph 8, that the defendants were engaged in a certain investigation which naturally and necessarily involved the possession and consideration of evidence, it could hardly be necessary that he should proceed to allege specially that the defendants had such evidence in their possession; and it seems hypercritical to the last degree to object, as opposing counsel do, that the whole indictment must fail because it does not expressly recite this fact, which is indissolubly bound up in the allegation, that an investigation had been had. So, if it were requisite that the indictments show that the companies mentioned in the same

paragraph 8 and under investigation by the defendant Tyner were actually using the mails, it would be unreasonable to ignore the necessary intendments carried in the averments already made in defining the extent and stating the character of his duty and jurisdiction in respect to such companies. In the sixth paragraph it is alleged that said defendant was:

"Charged with the hearing and preparation of cases relating to lotteries and the misuse of the mails in furtherance of schemes to defraud the public, that is to say, with the duty of investigating * * * the schemes and plans of business of all enterprises and concerns * * * in the conduct, promotion and furtherance of which the mails of the United States were being used" (pp. 3, 4).

When, now, in the eighth paragraph the cases of eighty companies are alleged to have been pending before Tyner, as Assistant Attorney General, charged with the duties and clothed with the jurisdiction already defined, and to have been pending for the purpose of the very investigation previously specified as devolving upon him with reference to companies using the mails, it is impossible to avoid understanding that the companies named were using the mails. Granting, for the sake of argument, that such an implication would be insufficient in laying the charge, and that the fact should be more directly stated when it is necessary to be laid as one of the elements of the offense, the intendment is clear enough for the purposes of inducement.

Other instances will be found in the briefs filed on behalf of appellants in which opposing counsel have insisted upon similar omissions to allege small and immaterial details as being defects fatal to the whole of the indictments. Their position on this point involves a confusion of the rules applicable to the various parts of an indictment, and erroneously demands a fullness and strictness in merely introductory and collateral averments which are properly requisite only in setting out and particulariz-

ing the elements of the offense itself. Several of the so-called "assumptions and conclusions" which are cited in the briefs for appellants will be found to be instances of trifling omissions such as have been mentioned, which are sufficiently supplied, if material at all to be supplied, by the clear and necessary intendments of the context.

II.

The other "assumptions and conclusions" specified by appellants and urged as fatal defects in the indictments will be found to fall into two classes:

First. One class of so-called assumptions, which are really direct averments of matters of fact; and,

Second. Instances in which the pleader has omitted to state some matter of fact which is really immaterial, but which opposing counsel assume should be stated.

It is believed that, with the exception of two or three cases, in which the pleader relies, for some unimportant detail, upon natural and proper intendment, as has been indicated, these two classes comprehend all the instances particularized as assumptions.

In the brief filed for appellants by Messrs. Crain and Hershey (pp. 18–22) is a copious enumeration of such "assumptions and conclusions" imputed to the pleader. The instances catalogued are too numerous to be examined in detail, but a few may be compared with the indictments to illustrate how all fall into one or the other of the two categories above indicated.

As an example of the first class, that in which the indictment makes a direct averment which is characterized by counsel as an assumption, may be taken the first instance specified, on page 18 of the brief mentioned, wherein,

referring to paragraph 6 of the indictments, it is objected that the pleader has assumed—

"That the duty of General Tyner to render opinions and hear and prepare cases relating to lotteries and fraudulent enterprises, which necessarily involved the making of a recommendation, imposed the mandatory duty to immediately recommend a fraud order whenever he found that a person or concern was conducting a lottery or a fraudulent enterprise."

Upon consulting the passage referred to, it will be found to read:

"That as such Assistant Attorney General, the said James N. Tyner was charged with the duty, among other things, of giving opinions upon questions of law arising in the course of business in the said postal service; * * * with the duty of investigating in good faith, diligently and to the best of his ability the schemes and plans of business of all enterprises and concerns brought to his attention from time to time by reference from the said Postmaster General or otherwise * * *; and if upon such investigation it appeared to him, the said James N. Tyner, that any such scheme and plan of business aforesaid was obnoxious as aforesaid to the said laws, etc., etc., * * * then and in that event to report his conclusion and opinion in the premises to the said Postmaster General, etc., etc., together with a recommendation that such fraud order should be issued, etc., etc."

Here is certainly a positive averment that the defendant Tyner was charged with the duty, not only of investigating and of reporting but of recommending a fraud order in the contingencies specified. Whether or not that duty is truly stated is a question of substantive law which may be reserved for later consideration; but so far as the statement is concerned, there is no question that this is a direct and affirmative averment involving no assumption whatever.

Again, in respect to paragraph 9 it is objected that the indictment assumes "that General Tyner, as Assistant Attorney General, instructed Mr. Barrett to assist in these

cases." The paragraph makes a direct averment that "it was the duty of him, the said Harrison J. Barrett, as such assistant attorney, to be rendering diligently and in good faith to the said James N. Tyner such assistance in the premises as might be within his power." There is no suggestion as to how or why such duty devolved upon Barrett, nor is there any occasion to specify more than the ultimate fact that such was his duty. It may at the trial be necessary to prove either that there had been a direct assignment of Barrett to this duty, or that the duty fell to him in the general division of the business of the office, or that the duty became his by voluntary assumption or in some other way; but these things are matters of evidence and not of pleading.

There is a further objection (p. 19) to the same paragraph, that it assumes "that it was General Tyner's duty forthwith, upon reaching the conclusion that the said plans of business of the companies were either lotteries or fraudulent, to make a report to the Postmaster General," etc., etc. The indictment declares "that thereupon and upon the reaching of such conclusion and opinion it became and was the duty of the said James N. Tyner, as such Assistant Attorney General, to report to the said Postmaster General," etc., etc.

Whether or not the duty is truthfully stated is not the present question, which concerns itself only with the technical sufficiency of the statement. The point of immediate importance is that what counsel call an assumption is a direct and positive averment of the duty, leaving nothing to inference or implication.

So, on page 19 of the same brief, it is assigned as an unwarranted assumption of the pleader, in paragraph 7, that General Tyner would continue to be Assistant Attorney General on January 1, 1901, and thereafter, and that the cases relating to the misuse of the mails would continue to come before him for adjudication.

The pleader alleges no such thing, nor does the allegation he does make assume it or imply that the pleader supposed

any such fact. The averment is that Barrett expected and intended that the facts would be so. The continuance of Tyner in office is mentioned as a thing had in contemplation by Barrett and as a part of the plan which he had conceived, and the statement of Barrett's plan and purpose is as direct and clear as such a statement can be made.

Again, on the same page of the brief and in respect of the same paragraph, there is said to be an assumption—

"That a recommendation to the Postmaster General, that fraud orders issue, would have been conclusive on the Postmaster General, and that they would forthwith have been issued by him."

The paragraph avers, as a matter of fact, that it was the duty of Tyner to recommend the issue of a fraud order, in order "that thereby the issuance of such fraud order might be obtained," etc. This is a mere statement of a duty and of the purpose towards which such duty was directed. It implies nothing whatever as to whether the fraud order would be issued or not. The fact that Tyner was bound to recommend a fraud order does not in the least involve an assumption that such order would issue, and the possible or probable action of the Postmaster General upon the recommendation does not at all affect Tyner's duty in the premises as set out in the indictment.

In respect to paragraph 10 of the indictments, it is objected on page 20 of the brief cited that this paragraph assumes:

"That all these companies were then engaged in the business under investigation, that their plans of business were in violation of the laws referred to, and that they were using the mails, and that there was evidence of these facts before General Tyner."

This paragraph does not assume or allege that the companies were unlawful in their plans or operations, but refers

to a previous averment that Tyner had found and believed such to be the fact and had formed an opinion of that character.

If it were necessary as a prerequisite to the formation of the conspiracy alleged, as a condition to the exercise of Tyner's jurisdiction, or as an essential to the offense charged, that the companies named in paragraph 8 should appear to have been engaged in the business under investigation and to have been actually using the mails, these facts would seem, as has been pointed out, to have been already sufficiently intimated by intendment of other averments. So of the suggestion that the showing as to the evidence in the possession of defendants.

It is not, however, understood that any of these facts were necessary to the conspiracy charged. The jurisdiction of the Assistant Attorney General to investigate schemes supposed or apprehended to be unlawful was not dependent upon an actual use of the mails. As opposing counsel well observe:

"The law is not punitive, it is merely preventive" (p. 27).

The postal authorities might well enough inquire into the nature and purposes of concerns which were merely suspected to intend an improper use of the mails, and the exercise of the authority to deny such concerns those privileges might anticipate any actual violation of the law. So any person or company contemplating an enterprise of doubtful legality might submit to the Assistant Attorney General the question whether he would be entitled to postal privileges, and that officer might properly and wisely pass upon the question before any harm had been done or guilt incurred; and whether or not such action upon proposed or hypothetical cases was competent, the doubt does not affect the averment that the defendants conspired with reference to the cases that are affirmatively shown to have been

actually before them; whether properly or improperly before them is immaterial to the fact of conspiracy.

In this instance we find an example of the second class into which the assumptions imputed by counsel for appellants to the pleader have been divided. Counsel themselves are guilty of an assumption, in that they suppose that the conspiracy laid could not have been formed or would not have been criminal unless certain facts existed which are not, as they insist, properly alleged.

The truth is, as will be presently more elaborately shown, that it is not at all necessary to allege that the conspiracy was a reasonable or practicable scheme, or that it was in its nature successful, or that it dealt with a proper or available subject-matter, or that the conspirators were correct in their conceptions as to the nature and value of the material with which they concerned themselves; and so, if it should appear that these defendants really laid their plans with reference to cases over which they had no proper jurisdiction, or even actual control, that fact would not affect their guilt if the intent and attempt of the scheme was to do what is charged in these indictments, namely, to defraud the United States or to misconduct themselves in office.

This phase of the question is better considered in connection with another of the so-called assumptions of the indictment, which in one instance exemplifies objections of both the classes into which we have divided these alleged assumptions specified by counsel for appellants. In this case the objection appears to overlook a direct averment of fact, and also suppose that it is necessary to allege other facts which are utterly immaterial.

The example referred to is a passage in paragraph 8, which is cited (page 19 of the brief mentioned) as involving an assumption that "the cases of the eighty companies pending were cases properly before General Tyner as Assistant Attorney General for investigation and report to the Postmaster General."

The allegation in paragraph 8 reads thus:

"That during the period between the third day of July in the said year one thousand nine hundred and the first day of November in the year last aforesaid, there were pending before the said James N. Tyner, as such Assistant Attorney General, the cases of certain companies, to wit, etc. * * * for investigation and report to the said Postmaster General upon the question whether or not the several schemes and plans of business of the eighty companies last aforesaid were obnoxious to the laws aforesaid," etc.

It is difficult to see how it could be more directly and positively alleged that these cases were pending before General Tyner, that they were pending for inquiry as to the legality of their business under the postal laws relating to frauds and lotteries, and that they were pending for investigation and report by General Tyner to the Postmaster General. In these averments not only is there no assumption, but actually no room for any assumption whatever.

It seems, however, to be intimated that the passage assumes that the cases were *properly* pending before Tyner, and is fatally defective in not expressly averring the propriety and legal sufficiency of the means and antecedent proceedings by which they were brought to that officer's attention.

It will be observed that in paragraph 6 of the indictment (page 3) is a statement of Tyner's duty and authority with respect to cases involving the right to use the mails. According to the express averments of said paragraph, the Assistant Attorney General was charged with a duty and invested with authority as to—

"The hearing and preparation of cases relating to lotteries and the misuse of the mails in furtherance of schemes to defraud the public, that is to say, with the duty of investigating in good faith diligently and to the best of his ability the schemes and plans of *all enterprises and concerns* brought to his attention from time to time by reference from the said Postmaster General, or otherwise, in the conduct, promotion and furtherance of which the mails of the said

United States were being used, and which enterprises and concerns were suspected to be either schemes or artifices devised to defraud, to be effected by the use of the mails, or to be lotteries or enterprises, etc., etc." * * *

The eighth paragraph, after reciting that eighty cases were pending before General Tyner, proceeds in the language above quoted to aver that they were before him for the purpose of being investigated by him with reference to the very questions which in the sixth paragraph are alleged as within his particular province. Thus the pleader, having previously defined the official jurisdiction of the Assistant Attorney General, identifies these pending cases by apt words to bring them within the scope of that jurisdiction as thus defined. Had the first averment been that a certain court had jurisdiction over a certain body of cases, including cases of replevin, and a subsequent averment been to the effect that a certain case of replevin was pending in the same court, no question could arise as to the sufficiency of the second averment to show that the court had jurisdiction over that particular case and that such case was properly before that court.

So in this instance, since the cases mentioned in paragraph 8 are so characterized as to show that they naturally and necessarily fell within the scope of Tyner's authority, as previously set out, it is clear that they were properly before him for adjudication. It will scarcely be claimed that it was necessary to allege how and why these cases came to be pending before the Assistant Attorney General. That is to set out, step by step and item by item, all the several proceedings from the inception of each particular inquiry, and to trace the history of every one of these eighty cases down to the action by which it was at length laid before that officer. It has already been stated in paragraph 6 that such cases came to him "by reference from the said Postmaster General or otherwise;" and, since all these cases are shown to have been of such nature as properly to fall within Tyner's

authority, it certainly cannot be material to show the particular manner by which each of them reached him. It would be as reasonable to insist that in alleging the pendency of a suit in a certain court shown to have jurisdiction over such cases generally the pleader must aver the suing out and service of process, the successive steps of the pleading, and every other detail of procedure in the conduct of the cause, and show affirmatively that all had been correctly done.

Still further, it may be observed (not so much because the additional observation is important in itself as because the point illustrates a recurring fallacy in the argument of opposing counsel) that it is not material whether these cases were before the defendant Tyner properly or otherwise. The charge is that, having these cases before him, he conspired with Barrett to do certain things which were wrong, whatever might be the character of the cases.

It will scarcely be argued that an officer cannot misconduct himself or practice a fraud except in respect to matters which are in point of strict law properly in his hands. It will not be seriously claimed that official corruption is necessarily conditioned upon actual official authority, or that an officer proved to have been guilty of unlawful practice can escape by showing that he had no right to meddle at all with the subject-matter which he has abused. Suppose a suit for $500 to be brought in the District, to be brought before a justice of the peace, whose jurisdiction is limited to $300, and who has no power in the premises except to strike the case from his docket. Should the justice, under such circumstances, bargain with the defendant for a consideration to dismiss the suit, no one would say that he could shelter himself against a charge of corrupt misconduct by the plea that he had no jurisdiction in the matter. The fact that he had assumed to act, and had acted corruptly, would estop him to show his lack of authority.

So, in the case set out in the indictment, if the defendants took advantage of their official positions to exploit these

cases for their own emolument, their guilt would be the same whether or not they had proper authority in the premises. If the cases were not of such character as to fall within the jurisdiction of the Assistant Attorney General, if they had come to him by some irregular process, as by the blunder of a clerk in referring them to the wrong bureau, the fact remains that they were before Tyner; and it would be, for the reasons suggested, none the less improper for the defendants to make such cases the subject-matter of such a conspiracy as is laid in paragraph 10.

The fallacy of appellant's argument on this point, which, as has been said, is a recurrent one, consists in assuming that the conspiracy which is afterwards charged must appear to have been a practicable scheme and one which rested upon sound premises throughout. The truth, as will be later pointed out, is that there is no need to state a successful scheme or even one that could be made successful; and, of course, the sufficiency of the charge is not conditioned upon the propriety and correctness of all the material with which the conspirators were dealing.

A further example of this same fallacy appears in an exception, marked (*d*) to the ninth paragraph of the indictment, on page 19 of the brief cited. It is suggested as an "assumption" of the pleader—

"That all these eighty companies were in fact violating the laws referred to."

Now, in point of fact, the pleader neither assumes nor hints at anything of the kind at any place in the indictment. The averment is that these companies were under investigation with reference to the question whether they were or were not fraudulent and whether or not fraud orders should be issued against them. It was this fact, that such questions had arisen, that brought them within the jurisdiction of the Assistant Attorney General, and not the fact that they were actually fraudulent. That officer was charged

with the duty and authority to investigate these cases by reason of the inquiry as to the propriety of issuing fraud orders. This authority did not depend upon what facts he might find or what action he might recommend. It would be as reasonable to say that a criminal court has jurisdiction only in cases in which the accused is guilty, but that its judgments of acquittal are ultra-jurisdictional and void.

The error of the argument lies in the assumption that the conspiracy laid in the tenth paragraph depended for its existence, and that its criminality was contingent, upon the fraudulent character of the companies. The truth is that it is equally unlawful to juggle with sound companies or unsound ones, and that it was as criminal for the defendants to extort blackmail from honest concerns as from dishonest ones.

It will be seen that paragraph 10 does not recite that whereas the eighty companies mentioned were in fact obnoxious to the postal laws, the defendants found in that fact an opportunity to levy tribute upon offenders against the law. The charge is that the defendants, having found that the companies were violating the law, conspired to withhold their judgment to that effect, to keep the question open until Barrett could obtain employment, and to obstruct the due and orderly administration of the laws for the sake of Barrett's pecuniary advantage. This is not a charge of corrupt connivance with law-breakers, but of dishonest and corrupt failure to perform official duties. And it is manifest that it is immaterial whether or not the persons to be affected by the breach of duty were or were not actually engaged in unlawful practices.

It is said that Lord Bacon never accepted a bribe for giving an improper decision; but it is not supposed that he was any the less criminal because he took money for rendering righteous decrees. In the above-supposed case of the justice of the peace who accepts a reward for dismissing a suit over which he has no jurisdiction, it would not avail him to

show that the judgment he rendered was a sound one and the only one which could properly be given. So, in the present cases, should it appear that, contrary to the opinion averred to have been entertained by the defendants, the companies were not obnoxious to the postal laws and were entitled to the use of the mails, that fact would not alter the guilt of a conspiracy to obstruct the due and orderly administration of the laws or make the conduct imputed to the defendants any less a fraud upon the public.

It is, of course, impossible to take up all the particulars of these indictments which counsel specify as involving assumptions, and to point out in detail wherein the imputation merely implies an unwarranted averment of fact or itself involves an assumption that statement is essential, which in fact is not so. The examples already noticed must suffice for the present argument; but enough, it is believed, has been considered to demonstrate the fallacies underlying the criticisms made upon the indictments, so far as the correctness of the pleading is concerned. And it is confidently submitted that a further examination of the particulars itemized by opposing counsel will prove that the entire array of alleged defects are vindicated by such principles of pleading and considerations of law as have been herein pointed out.

III.

Taking up now that portion of the indictments in which the charge is laid, the tenth paragraph, we find that the offense intended to be stated is a conspiracy.

The essence of this offense is a corrupt agreement:

United States *vs.* Britton, 108 U. S., 204.
United States *vs.* Dealy, 152 U. S., 547.

The manner of charging the fact of agreement is as clear and direct as it is possible to make language:

"That on the said first day of November in the year of our Lord one thousand nine hundred, and at the District aforesaid, the said James N. Tyner and the said Harrison J. Barrett, did unlawfully conspire, combine, confederate and agree together, in contravention of their duty in the premises, not to report, etc."

It will scarcely be pretended that this averment is lacking in any requisite quality of positiveness or precision, or that it involves any of the multitudinous "assumptions and conclusions" which are alleged as vices in these indictments.

Proceeding next to define the agreement alleged, the tenth paragraph sets out fully and perspicuously a scheme of conduct which is declared in the one case to constitute a fraud on the United States, and in the other indictment to amount to misconduct in office.

The rule upon this point is that the indictment must particularize the facts which constitute the component elements of the offense intended to be charged:

United States *vs.* Cruikshank, 92 U. S., 542.
United States *vs.* Simmons, 96 U. S., 360.

Whether the several matters and things which it is averred the defendants agreed to do, and which constituted the scheme imputed to them, would, had they been accomplished, have amounted, as matter of substance, to fraud upon the United States or to the offense of misconduct in office may be reserved for consideration at a later point in the argument. The immediate question is only as to the technical sufficiency of the manner in which they are pleaded.

In considering this question it is to be observed that, in respect to the scheme which is alleged as the subject-matter of the conspiracy, the averments relate, not to things which were actually done, but to things which were merely agreed and planned to be done. The pleader at this point does not profess to set out accomplished facts

he outlines a criminal project entertained by the defendants. In the nature of the case, therefore, it may not be possible, and it certainly is not necessary, to show accurately and completely the full scope and particulars of the alleged scheme. Inasmuch as it is not alleged that the project was ever carried into execution, it is not requisite that it appear that the plans were practicable, or even reasonable, or that the pleader should supply every detail essential to a successful scheme and explain how all the facts specified were material and available for the purposes imputed to the conspirators. It is quite consistent with the truth of the charge and with the guilt of the defendants that many of the practical particulars of the criminal project were left open for future consideration, that some things were deferred to await fortunate opportunity, that some postulates assumed by the conspirators were erroneous, that the methods adopted were badly designed, and that the scheme was awkward in its details and impossible of execution as a whole.

The offense may be complete before the details of the conspiracy have been settled upon or even considered.

Dealy *vs.* United States, 152 U. S., 543.

United States *vs.* Goldman, 3 Woods, 191.

"In offenses of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for perpetrating it."

Carson on Conspiracy, p. 196.

It is not necessary that the scheme alleged should appear to have been successful.

United States *vs.* Newton, 52 Fed. Rep., 281.

Ochs *vs.* People, 25 Ill. App., 415.

United States *vs.* Sacia, 2 Fed. Rep., 754.

Nor that the means and methods attributed to the conspirators should appear sufficient, or even in their nature adapted to accomplish the criminal purpose alleged.

United States *vs.* Sanche, 7 Fed. Rep., 715.
United States *vs.* Donau, 11 Blatchf., 168.
Madden *vs.* State, 57 N. J. L., 324.

Neither is it requisite that the means alleged to have been adopted by the defendants should themselves amount to a crime or even be in themselves criminal.

United States *vs.* Cassidy, 67 Fed. Rep., 705.
United States *vs.* Thompson, 29 Fed. Rep., 86.

Mere silence or non-feasance under circumstances wherein it is the party's duty to speak or act may be the means.

State *vs.* Young, 37 N. J. L., 189.

Still further, it is not requisite that the scheme alleged should appear to have been in its nature profitable to either of the conspirators, or in its nature calculated to advance their interests.

United States *vs.* Benson, 70 Fed. Rep., 591.

In the case, therefore, of conspiracy to commit misconduct in office, all that is necessary is to lay a direct charge of conspiracy, and to complete it by a statement of things agreed upon which, if done, would amount to the offense stated. In charging conspiracy to defraud, the essential elements to be directly averred are the fact of agreement and the particular matters agreed upon, which must be sufficient, if carried into effect, to be a scheme or fraud.

Where the charge involves the setting out of a scheme to defraud, all that is requisite is thus defined:

"As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential

to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

United States *vs.* Hess, 124 U. S., 486.

It will be observed that the requirement is not that the scheme shall actually have defrauded any one, or even that it is in its nature adapted to do so, but only that it shall be one which is devised to that end, and the particulars of the scheme to be stated are not such as make it practicable or criminal, but only those which are necessary to identify it and to apprise the accused of the particular facts intended to be proved.

These principles will serve to eliminate from consideration many of the objections assigned by opposing counsel to the indictments. Two pages (pages 20, 21) of the brief already cited are devoted to an enumeration of the supposed "assumptions and conclusions" found in the tenth paragraph, wherein the charge is laid. Of this formidable array of exceptions, the greater part will be found to consist of the assumptions of counsel that divers facts must be pleaded which the authorities above cited show to be unnecessary and immaterial.

As it is not requisite that the project outlined in the indictments should appear to be practicable, still less must it be shown that every several item of the scheme should be shown to be conducive to success, or even unlawful in itself; nor is it material if the pleader has omitted to point out how and why the conspiracy alleged would have inured to the advantage of both or either of the conspirators; nor would it detract from the force of the charge should the court find that the criminal project outlined is incompletely stated or defective in certain elements material to its actual execution. Neither does it affect the criminality of the offense if it be shown that some of the means which were employed were in themselves innocent, or even within the scope of defendants' proper official duty.

Still less, of course, is it material to show that the United States were not in fact defrauded, or that the defendants did not actually misconduct themselves in their official action.

A further observation with respect to the sufficiency of these indictments in their statement of the charges is that there is no rule of criminal pleading by virtue of which the facts must be so set out as by their statement alone to imply and demonstrate the fact of conspiracy.

The conspiracy is not, in the pleading, a matter to be inferred from other facts stated; it is a matter to be directly averred as a distinct, independent, and essential fact. Among the numerous other vices in the argument of opposing counsel is this assumption that the facts alleged must be such as point necessarily and infallibly to an unlawful agreement and establish the fact of conspiracy independently of any averment of that fact. In the brief of Messrs. Crain and Hershey (p. 36), after a recital of several facts alleged in the tenth paragraph (which is by no means an exhaustive summary of the averments on the subject), it is asked:

"Does the doing or non-doing of these things raise a presumption of conspiracy? If not, where else in the indictments or in what other way does the pleader make out the meeting of the minds or breathing together?"

To this it may be answered that the doing of some things and the non-doing of others, according to the allegations of paragraph 10, might very well raise a presumption of conspiracy in the mind of an honest and intelligent man, particularly when viewed in connection with all the other facts set out in the indictment. No doubt, a jury, having all these facts in evidence before them, would be justified in inferring a prior agreement; but in the indictment the fact of such agreement does not depend upon any inference whatever, but is directly and positively averred in language above quoted; and, had this averment been omitted and the fact

of conspiracy been left to mere inference, the pleading would have been justly obnoxious to some of the strictures of opposing counsel.

The same principle applies to the objection that "the allegation as to the impression to be made on the companies, etc., is a mere inference of the pleader." It is claimed that "some fact or facts must be stated with particularity warranting such a deduction" (p. 39). The charge is directly laid that it was intended and agreed, as a part of the conspiracy, that the opinion of the defendants should be so framed as to produce the impression that Barrett, and Barrett alone, knew how to amend, and that he alone could successfully reform the plans of the company in such manner as to secure the approval of the Assistant Attorney General for the Post Office Department, and that it would be greatly to the interest of the companies to employ Barrett (Rec., pp. 9, 10).

This is a direct and positive averment, relating to an element of the scheme imputed to the defendants, and expressly stating as a matter of fact that there was the intention and agreement, by certain means, to produce the impression specified. Neither the fact nor the nature of the impression intended to be alleged is left to inference, and there is no reason why any facts should be set out as a basis for inference upon the subject. Even if such an array of circumstances had been marshaled as would infallibly demonstrate that it was intended to produce the impression alleged, that would have been insufficient without a positive allegation on the point. And, in the presence of such allegation, it is not perceived that the pleading would be helped had other facts been adduced, no matter how cogently such other facts had led to the ultimate fact which is stated.

Proceeding upon the same fallacious assumption that the ingredients of the offense must be shown by inference from circumstances and independently of positive averment,

counsel, on page 36 of their brief, thus criticise the tenth paragraph :

"It will be noted that so far in the indictments there is not the remotest approach to a statement of the necessary ingredients of the crime of conspiracy, but having set up various supposed *duties*, it is now proposed in paragraph 10 (Rec., pp. 7–10) to have the minds of Gen. Tyner and Mr. Barrett meet in a criminal conspiracy, by alleging that they have not done their duty as the pleader conceives it, but have done something else, to-wit: &c., &c."

To this it is to be answered that there has been, prior to the tenth paragraph, no occasion to state any of the ingredients of conspiracy, because that fact is not heretofore charged and all that goes before is matter of inducement to the charge, and that there is no purpose or attempt to show a criminal meeting of minds by averment that the defendants have not done their duty or by averment that they have done certain other things (which, by the way, are not correctly recited in the passage above quoted in part). The criminal meeting of the minds is not alleged by inference from other facts, as seems to be supposed by counsel, but by a direct averment that the defendants "did unlawfully conspire, combine, confederate and agree together" to do certain things in contravention of their duty as previously defined.

In like manner counsel find fault with the sufficiency of the statement to show the fact of conspiracy, utterly ignoring the positive charge of corrupt agreement and urging that the acts alleged might be consistent with innocence, relying upon a passage in Evans *vs.* United States, set out on page 37 of their brief. It may be that all the facts charged would consist with innocence if there were no averment of conspiracy. But in taking all the facts to be true the fact of an unlawful agreement must be included, and this fact gives a criminal complexion to all.

Proceeding further with the objections urged on the same page, it is to be said—

That it is not necessary to show that the United States were prejudiced, but only that the purpose and endeavor was to prejudice them;

That it is not requisite that the Postmaster General should have signed the proposed opinion "as a matter of official routine," it not being alleged that he did so, but only that such was the intention of the conspirators;

That it would not alter the guilt of the defendants should it appear that the Postmaster General knew of, agreed to, or approved their conduct, or even if that officer were shown to have been a party to the conspiracy;

That the inadvertence, negligence, unwisdom, or corruption of defendants' superior officer, were all or any of such facts made to appear, would be immaterial upon this charge;

That it is not material whether the preparation of the opinion mentioned, or whether any other particular act or step done or taken by defendants, was or was not criminal or improper in itself;

That the pleader does not "assume" what the alleged opinion was to be, but avers its character, purpose, and effect according to the plan alleged to have been adopted by the conspirators.

As to setting out the opinion in the indictment, inasmuch as it is not alleged that the opinion had any existence save in the minds of the defendants, the pleader could hardly have been expected to reproduce and clothe in concrete language the airy nothing of their fancy.

Nor is it material whether or not the defendants knew how the plans of business, which it was a part of their scheme to pronounce defective, might or should be amended. It is complained that the indictment fails to show that either Tyner or Barrett had any exclusive knowledge on the subject, or that there was any dereliction of duty on their part in omitting to advise the companies as to the requirements of the law.

This objection, made on page 37 of the brief hereinbefore

mentioned, is, like several others, based upon the assumption that every step taken in the execution of the conspiracy and every element of the criminal project must be in and of itself criminal. It has already been pointed out that the means by which the unlawful purpose is to be accomplished may be morally indifferent, and that conspirators may even avail themselves of things which it is their duty to do.

With respect, further, to this particular objection, it should be observed that the failure of the defendants to state how the condemned plans of business could be amended is mentioned in such connection as to leave it quite immaterial whether or not they knew how to amend. The charge is that they agreed, as an element of their conspiracy and unlawful plan, so to frame their opinion and so to conduct themselves as to create the impression that they did know how to amend and that the companies in trouble would find it useful to take advantage of Barrett's retirement from office and avail themselves of his proffered services. Now, if such was in fact the intention of the defendants, and it is so directly averred, then it would not affect either the criminality of the act or its efficiency as a means of defrauding, if in truth Barrett had no knowledge on the subject whatever and was utterly without ability to assist the companies. If the impression was created that Barrett had peculiar facilities or private information that would be useful to his clients, it would not detract from his offense could it be made to appear that he was actually incompetent and wholly unable to make good the expectations he had raised.

It follows that, in passing upon the moral quality and legal effect of the omission to formulate sound amendments in the opinion, it is unnecessary to inquire, and it was immaterial to allege, whether or not the defendants or either of them was competent to devise improvements which would obviate the objections which they professed to have found to the schemes of the companies. The averment is that defendants were to pronounce all these schemes vicious,

that they were to register a solemn official adjudication which meant the ruin of the companies, that they were, *ex cathedra*, to threaten the issue of fraud orders against them all, and yet at the same time they were to be careful not to close the door of hope against any of the unfortunate concerns. They were to suggest that amendments might be made which would insure salvation for the most vicious of the concerns; they were to produce the impression that one man alone, the author of their condemnation, was competent to show them the way to light and safety. If this cunning device was not based upon truth, it was only the more objectionable upon moral grounds. But, whether the impression was true or false, it appears to have been an equally effective agency in the accomplishment of the scheme outlined in the indictments, and, in either view, it was equally a breach of duty.

IV.

The official duties of the defendants are made the subject of extended discussions in the briefs filed on behalf of appellants, and it is insisted that the indictments are fatally defective in both the manner and matter of their averments upon this point.

A sufficient portion of the foregoing argument has been addressed to the technical correctness of the pleading so far as it touches the subject of defendants' duties. It remains to inquire whether these averments are true in fact and sufficient in substance to support the charges based upon them.

Section 396, Revised Statutes of the United States, provides that—

> "It shall be the duty of the Postmaster General * * * to superintend generally the business of the Department, and to execute all laws relative to the postal service."

Section 390, Revised Statutes of the United States, provides that—

"There shall be employed in the Post-Office Department one assistant attorney general, who shall be appointed by the Postmaster General."

The statutes do not prescribe what shall be the duties of the Assistant Attorney General for the Post-Office Department, but by section 161, Revised Statutes of the United States, it is enacted that—

"The head of each Department is authorized to prescribe regulations not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

In pursuance of this authorization, the Postmaster General has, from time to time, prescribed various regulations upon the subjects mentioned in section 161. In a code of such regulations, formulated in 1893 and in force at the dates fixed in these indictments, it is prescribed that—

"The Assistant Attorney General is charged with the duty of giving opinions to the Postmaster General, or the heads of the several offices of the Department, upon questions of law arising upon the construction of the postal laws and regulations, or otherwise in the course of business in the postal service; * * * with the hearing and preparation of cases relating to lotteries and the misuse of the mails in furtherance of schemes to defraud the public; .* * * and with such other like duties as may, from time to time, be required by the Postmaster General."

Postal Laws and Regulations, 1893, p. 13.

The duties of the law clerk, who, after July 1, 1899, was designated as assistant attorney, are nowhere prescribed by statute; but the same publication, above quoted, further provides that—

"The law clerk is assigned to the office of the Assistant Attorney General for the performance of such functions as he may direct."

Ibid., p. 13.

So far as the duties of any public officer are defined by statute, they are, of course, judicially noticed by the court. In like manner judicial notice is taken of such rules and regulations as have been quoted, which are promulgated by executive officers in pursuance of statutory authorization.

"It may be laid down as a general rule, deducible from the cases, that, wherever, by the express language of any act of Congress, power is entrusted to either of the principal Departments of the Government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Caha *vs.* United States, 152 U. S., 211, 222.

So far, therefore, as the averments made in these indictments relate to duties prescribed for the defendants by either statute or executive regulation and cover the same ground, no question can arise either as to the truth of the matter pleaded or the sufficiency of the pleading. The court knows, without information from the pleader, what those duties are, and, in the event that the indictment should misstate the duty, no harm is done. The court, being otherwise advised on the point, ignores the erroneous statement of any fact within the judicial knowledge, and proceeds according to the truth of the matter.

Jones *vs.* United States, 137 U. S., 215.

In addition, however, to the duties prescribed by statute and regulation, other duties may be imposed upon an officer in other ways. It will be observed that the regulation of the Postmaster General above quoted, after enumerating a variety of functions assigned to the Assistant Attorney General for the Post-Office Department, adds, "such other like duties as may, from time to time, be required by the Postmaster General." Here is an express reservation of a power

to assign the Assistant Attorney General to other service than has been specified; and it cannot be doubted that such special designation as is contemplated in this reservation would be as much within the authority conferred upon the Postmaster General by section 161, Revised Statutes of the United States, as is the general designation embodied in the regulation; nor will it be questioned that a duty so imposed by special designation upon the Assistant Attorney General would be equally obligatory with the other duties prescribed by the formulated rule, or even with duties imposed by statute.

Still further—whether in consequence of the legal provisions already stated or independently of them is immaterial—additional duties may be imposed upon an officer by reason of a mere established custom and practice in the conduct of official business. The settled course of procedure in the administration of the Department crystallizes into what has been likened to a common law of the Departments, under which rights and duties arise of equal obligation with those created by express enactment or affirmative executive order.

"A practical knowledge of the action of any one of the great Departments of the Government, must convince every person, that the head of a Department, in the distribution of his duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything that he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed upon the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government.

"Hence, of necessity, usages have been established in every Department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits."

United States *vs.* Macdaniel, 7 Peters, 1, 14.

In still further addition, an officer may acquire duties by the mere fact of performing certain functions; his assumption of such functions raises an obligation to fidelity in the discharge thereof. A merely *de facto* officer is criminally liable for malfeasance in the duties which he has without authority undertaken to perform.

Mechem on Public Officers, sec. 336.

It is clear, therefore, that an officer may be charged with many important duties which are not prescribed by statute, written regulation, or any other means within the knowledge of any court. The only way the fact of his having such duties can be brought to the attention of a court is by averment of the fact as of any other matter of fact. Courts do not keep themselves informed of all the special orders and particular assignments of duty given by the heads of Departments to their subordinates, and they are not acquainted with the customs and settled order of business obtaining in the administration of public business. In respect to duties thus created, which lie beyond the reach of statutes and written regulations, and therefore beyond the range of judicial cognizance, it is not only proper but indispensable that an indictment or other pleading should lay the duties just as it lays any other facts material to the case and unknown to the court.

This is what the pleader has done in respect to a part of defendants' duties laid in these indictments, and because the indictments depend upon the averment of these matters as matters of fact, it is insisted on behalf of the appellants that the pleading is fatally defective.

Thus the indictments (p. 3) aver that "*in the administrative*

arrangement of the business of the Post-Office Department," there was an office known as the office of the Assistant Attorney General for the Post-Office Department, and that the defendant Tyner was such Assistant Attorney General, and that as such Assistant Attorney General the said Tyner was charged—

"With the duty of investigating in good faith, diligently and to the best of his ability, the schemes and plans of business of all enterprises and concerns brought to his attention, from time to time, by reference from the said Postmaster General or otherwise, in the conduct, promotion and furtherance of which the mails of the said United States were being used, and which enterprises and concerns were suspected to be either schemes or artifices devised to defraud, to be effected by the use of the mails, or to be lotteries, * * * with a view to ascertaining and determining whether or not such schemes and plans of business were in fact of any of the kinds obnoxious as aforesaid to the laws aforesaid * * *; and, if upon such investigation it appeared to him, the said James N. Tyner, that any such scheme and plan of business was obnoxious to the laws aforesaid, * * * then and in that event to report his conclusion and opinion in the premises to the said Postmaster General, with a statement of the facts upon which such conclusion and opinion were based, together with a recommendation that such fraud order should be issued in such case," &c., &c.

It is objected that the averments quoted are unwarranted because, it is said, they are the mere conclusion of the pleader, drawn from the regulation of the Postmaster General, and that the regulation does not sustain them.

It does not, however, appear from anything in the indictment itself that the facts thus alleged are drawn from the regulation, or that they depend in any manner upon the regulation or anything else. The duties specified are evidently beyond the scope of the regulation, and they are alleged as substantive independent facts, falling within "the administrative arrangement of the business of the Post-Office Department."

If, now, it be true that Tyner was charged with these du-

ties, not by reason of the regulation quoted, but in some of the other ways in which duties may be imposed, how could that fact be made to appear otherwise than by a direct averment, as of any other matter of fact not grounded upon some written enactment? And now that the fact of such duties is thus averred, how can the court say, upon mere consideration of the pleading, that the averment is either true or false? Not by reference to the regulations, certainly, because it has been shown that there may be an infinitude of duty outside and beyond the limits of the regulation, and the fact that the written rule does not include such duties as are alleged does not warrant the inference that such duties do not exist, and are not binding, in virtue of some other authoritative institution. Manifestly, the truth or falsity of this charge of duty is a matter of fact, and to be determined, not by resort to the judicial knowledge, but as other matters lying beyond the cognizance of courts are determined.

It is not, therefore, correct to say that the specification of defendants' duties, in addition to those prescribed by the regulation, is based upon the pleader's conclusion as to the extent, contents, and effect of the regulation. It may be true, and it probably is, that the requirements of an investigation, of a report, and of the recommendation of fraud orders in cases found to be proper for such orders are an elaboration of the regulation prescribing the functions of the Assistant Attorney General, the averments upon this point indicating that the generality of the regulation has been supplemented by particular orders in respect to details, and that additional rules had been formulated to provide for the practical administration of the duties imposed by the published regulations. But it does not follow that all these details and matters of practice are the inference of the pleader. On the contrary, the presumption, which is aided by the apparent purport of the allegations, is that the pleader had informed himself as to the course of business at the Post-

office Department and the manner which had been provided for carrying the general provisions of the regulation into practical effect.

In like manner, as to the duty incumbent upon the defendant Barrett, the indictment sets out that "as such law clerk and as such assistant attorney, the said Harrison J. Barrett was charged with the duty of aiding and assisting diligently and in good faith the said James N. Tyner, as such Assistant Attorney General, in the performance of the duties aforesaid" (p. 4). It has already been shown that by the regulations it was provided that the law clerk was to perform such functions as the Assistant Attorney General might direct. What the Assistant Attorney General might and did assign to the law clerk is therefore not a matter of law, to be judicially gathered from public documents, but a matter of fact, to be made the subject of averment and to be established as any other fact is established.

To this allegation it is objected that, so far as the regulation goes, Tyner might have assigned Barrett to some other duty; and the statement of Barrett's duty to aid and assist in these particular matters is pronounced a pure assumption of the pleader. No doubt Barrett might have had other functions, and, in the absence of some distinct declaration on the subject, it could not be judicially known and could not be assumed that he did not. But here we have an averment as to the fact—a fact lying beyond the judicial cognizance and without the scope of the regulations; and it is submitted that this is a sufficient pleading of the fact to make it a part of the case.

But it is further objected that it is not sufficient to allege the existence of the duty, but the particular manner in which such duty arises must be set out.

Where, as in the case of Ainsworth *vs.* United States, 1 App. D. C., 518, a duty is supposed to arise by reason of the party's relation to other persons or to particular facts, and the obligation is to be inferred from a particular collocation

of circumstances, it is no doubt true that the facts relied upon as imposing the obligation must be so set out as to show that the situation does create an obligation and the pleader has drawn the correct inference from the premises. It is not supposed, however, that any such rule obtains where the pleading relates to details of duty attaching to a public office where the obligation exists, not by inference from any particular facts, but as inherent in the office. The duties here attributed to the respective defendants do not grow out of their relations to other persons, unless it be their relationship to the public as public officers, and the obligations specified are not deduced from any antecedent or collateral facts, unless it be the fact that they held office. In such a case it would be impossible to set out any course of inference or deduction, except to declare that the duties specified grew out of the fact of official tenure, and that fact is certainly laid with sufficient fullness. It is alleged that these defendants held each an office, and that by reason of such holding certain duties were incumbent upon each. The duty is an independent fact, alleged as an attribute of the office, and not a conclusion flowing from any other fact. In the face, therefore, of a positive and independent averment of the fact, the truth of which is not conditioned upon other facts, the rule laid down in the Ainsworth case has no application.

If, however, it were necessary to satisfy the supposed requirement that the origin of every duty alleged must be stated, it is expressly averred, by way of introduction to the laying of the duties and as applicable to the whole course of statement upon this subject, that all the facts stated existed "in the administrative arrangement of the business of the Post-Office Department" (p. 3). The assignment of duties as alleged was made in such "administrative arrangement." The phrase points to a departmental routine, an executive custom, an administrative common law such as is mentioned in the Macdaniel case, *supra*. Whether any particular function devolving upon a particular officer originated

in some special designation, or some general order emanating from the head of the Department, or fell to him by accident in the distribution of business, or was directed to him by some natural gravitation due to a relationship with his other duties, is a question which in any given case might be impossible to answer and which in none could be material. The important fact is that as the Department was organized, and in accordance with its practical distribution of functions, the particular duty came to the officer named. In the face of such a present settled course of business, having of itself, as we have seen, the force of law, it is certainly not necessary, in order to account for the devolution of any specific duty upon a certain official, to ransack the archives of the Department to ascertain whether the existing arrangement is the result of some departed Postmaster General's general order or private assignment, or originated spontaneously in the natural working of the office, or came into being in some other obscure and perhaps unaccountable way.

Let us, by way of illustration, consider the nature of Tyner's duties, as set out in paragraph 6, in reference to the proceedings in the matter of lotteries and fraudulent schemes. The regulation had charged him generally "with the hearing and preparation of cases" of this character. The indictment alleges as further duties the investigation of such cases, the report of his conclusion to the Postmaster General, the recommendation, in proper cases, of fraud orders. The investigation of schemes alleged to be fraudulent is evidently involved in the duty of hearing and preparing cases, which is imposed by the regulation. There could scarcely be a hearing and preparation which did not presuppose or require investigation. If it be conceivable that there are instances of investigation which are independent of and distinct from hearing and preparation of the cases, it is evident that the duty to make such investigation would come to the Assistant Attorney General either as in-

cidental to his prescribed duty of hearing and preparing some case of this character or else by reason of such investigation being related by nature to the general character of that officer's duties. In either case, it is unlikely that there would be any general or special assignment of such duty to the Assistant Attorney General, or, if there were, it would probably be impossible to find it; and, whether or not there had been such specific action in any given case or class of cases, it would result that the assignment to this particular office was by reason of the fact that business of this character fell to it in accordance with the general distribution of departmental matters. In any case, therefore, we come back to what the pleader has called the administrative arrangement of business in the Department.

So, with respect to the making of a report and the recommending of fraud orders, these things naturally grow out of, and are almost necessarily implied in, the regulation imposing the duty of hearing and preparing cases. It is difficult to conceive of any hearing which does not necessarily tend to a conclusion, or of the preparation of a case which does not include a report. Inasmuch as the whole purpose of these hearings was to inform the Postmaster General with regard to the propriety of issuing fraud orders, it would seem to result inevitably that the function of investigating comprehended the making of a report to the Postmaster General and a recommendation as to the issue of a fraud order. It might therefore be sufficient to say that the averments on these points follow necessarily from the precedent recital of provisions of the regulation, and that, in accordance with the rule in the Ainsworth case, the facts already set out are sufficient to sustain the supplemental averments of duty supposed to arise from those facts.

If, however, these averments are not sufficiently supported by the recital of the provisions of the regulation, it is, notwithstanding, clear that the practice of making such reports and recommendations as are suggested is one that would, natu-

rally and without any specific act or order of institution, spring up in the practical execution of the regulation. It is extremely unlikely, indeed scarcely possible, that any Postmaster General or other authority ever expressly prescribed that reports and recommendations should be made by the Assistant Attorney General. That course of procedure is so much the necessary outgrowth of the requirement to hear and prepare the cases that it must have arisen and crystallized into settled practice without being specifically ordained by any body. If such is the truth, it would be vain to search for any departmental order on the subject; if such is not the truth, the discovery and recital in the pleading of a concrete provision for such reports would not at all clarify the existing practice or add to the strength of the averment as to such practice. In either event, the origin and binding force of the customary rule are covered by the allegation that such custom existed by virtue of "the administrative arrangement of the business of the Post-Office Department." The ultimate reliance, whatever be the truth as to the origin of the duty, is upon the settled course of business which makes the common law of the Department.

This existing administrative arrangement and settled course of business at the Department, simply as a present fact and independently of its origin, is strong enough to stand alone and to create obligations of official duty. The accepted practice, whether it be traceable to the order of some Postmaster General or arose by accident and acquiescence in the distribution of business, or grew spontaneously from the nature of the general arrangement of departmental affairs, constitutes a rule which creates rights and obligations, and which, therefore, need not be accounted for when it becomes necessary to plead the practice as an authority or a source of duty. Like the common law, to which it is likened, the settled order of business in the Department may rest upon ordinances which have been worn out by time.

It may have been originally a matter of positive institution, but its present virtue springs from general acceptance and acquiescence. It would therefore add nothing to the averments which impute certain duties to the defendants if the indictments recited the original acts by which the existing usages came into being. It is sufficient to lay the duties as present facts and to show their existence and obligations as duties by proof of the administrative arrangement in accordance with which such duties fall to the defendants.

V.

Whether the defendants were bound, as a strictly mandatory duty, to do all the things mentioned in the indictments as incumbent upon them, or whether they possessed a certain latitude of discretion in the premises, is not a question of such materiality as is insisted by opposing counsel.

One essential element of their duty, as defined in the indictment, has been overlooked in the argument upon this point. It is expressly averred, in paragraph 6, that it was the duty of Tyner to investigate the schemes laid before him "in good faith." Even in the absence of such averment, the duty of good faith would be necessarily implied, and this requirement is tacitly annexed to the performance of his duty as a whole and in every detail. To that extent, certainly, whatever discretion the defendants may have had, the duties imposed upon them were mandatory and admitted of no deviation or compromise.

The averment as to the breach of duty, in paragraph 10, is clearly and essentially inconsistent with the observance of good faith in the discharge of defendants' official functions. Given the widest possible discretion, there is a necessary breach of the obligation of good faith in an agreement to exercise such discretion in the discharge of official functions for the advancement of the pecuniary interest of Barrett. We have here a positive declaration of corrupt intent which

negatives good faith and makes it immaterial whether or not the acts charged might have been done in the exercise of a legitimate discretion.

Independently of this, it is difficult to see how the court is to determine upon demurrer whether the duties of defendants, as laid in the indictments, were mandatory or otherwise. They are clearly alleged as mandatory without qualification. The particular functions with respect to which latitude is claimed in the briefs of opposing counsel—the making of reports and the recommending of fraud orders—are matters not specified in the regulation, and therefore not the subjects of judicial notice. The existence of such duties is matter of fact, beyond the letter of the regulation, and so to be alleged and proved as are other matters of fact. As these duties must be imposed by express direction of the Postmaster General or arise from a settled course of practice, resort must be had to the orders of the Postmaster General or to the character of the custom prevailing on the point to determine how far these reports and recommendations were imperatively required and to what extent the defendants were at liberty to use their own judgment in the premises. If, in truth, more or less was left to their discretion, and if, in fact, what they did was within the legitimate latitude of their judgment, those are facts to be shown in defense, and, if successfully established, will avail to disprove the conclusions of criminality so far as in law they ought to avail. But, in the face of a positive averment on the subject that as matter of fact the duties mentioned were mandatory, the court has no means of finding the existence of qualifications which must also be matters of fact.

Only one reason is suggested by counsel for holding that these defendants were clothed with discretion in their administration of the law on this subject, and that is that the duty of the Postmaster General in the premises was discretionary.

Whether the word *may*, as used in sections 3929 and 4041,

Revised Statutes of the United States, is mandatory or permissive, seems to counsel for the Government not at all decisive of the present question. In a matter which concerns the rights and interests of individuals, and especially in one which concerns the welfare of the public, a provision permissive in form is generally held to create a duty. It is a question of grave doubt whether Congress, after positively prohibiting the use of the mails to lotteries and fraudulent concerns, intended to leave it to the judgment of the Postmaster General whether the law should be enforced, and to confer upon that officer an authority to grant dispensations in favor of particular lotteries and schemes of fraud. If that question called for decision, it would be extremely difficult to sustain the contention made on the other side.

But, for present purposes, it makes absolutely no difference what was the lawful latitude accorded to the Postmaster General in this class of cases. It is nowhere alleged in the indictments that that officer was bound to issue fraud orders in any situation whatever; neither is it assumed that any such obligation rested upon him; nor is such assumption or allegation necessary in any degree to the case stated against the defendants. It is charged that these defendants were under obligation to report to the Postmaster General their findings and conclusions in these cases, and to recommend fraud orders in certain specified classes of such cases—that is to say, in the cases in which the statute provides for fraud orders. If, as is alleged, such was the duty resting upon these defendants, it is nothing to the purpose to say that the Postmaster General was not bound to follow their advice. It was utterly immaterial to them, and to their duty as laid in the indictments, what the Postmaster General might, could, would, should, or ought to do in the cases. All that was requisite, in order to meet the demands of the indictment, was that they should investigate, report, and recommend. If they did less, they fell short of the duty as laid in the indictment, and it would not in the

least avail them to show that the Postmaster General either was not subject to the same obligations or that he also failed in his duty. The elaborate discussion of this point, made by counsel for appellants, serves only to show that certain incumbents of the office of Postmaster General took a view of questionable liberality with respect to their duties in this class of cases; but it does not in the least tend to prove that the Assistant Attorney General was ever accorded a like latitude in the matter of giving or withholding his advice in such cases.

Whatever may be the truth as to the character of defendants' duties in these cases and the stringency of their official obligations, there remains the further consideration that their failure to perform that duty is not the gist of the offense charged against them. This is not an indictment for breach of the duty to report upon fraud cases and to recommend the issue of fraud orders. The charges are conspiracy to defraud the United States and conspiracy to commit misconduct in office. The failure to discharge the duties alleged is not the gravamen of either charge, but only an element in the offense, one of the means by which the offense was to be made possible and effective. Doubtless such a breach of duty as is here alleged might amount to a fraud upon the United States and to misconduct in office, and that whether the duty was mandatory or discretionary. But in this case that breach of duty, so far from being assigned as constituting the crime charged, is only an incident in the scheme of crime, one of the items constituting the plan by which the offense in either case was to be effected. In that view of the relation of the official derelictions alleged to the offense ultimately charged, the particular degree of the obligation which defendants violated becomes unimportant. The failure to perform a duty being only a step to a more serious offense, the existence of the duty is material only so far as it is requisite to explain how

and why the failure to perform it made the ulterior offense possible. In a somewhat similar case it was said:

"But, aside from all this, it is clear that the statement of the official character of the defendants was only to give color to the transaction. It was to exhibit the significance of the agreement by setting out the ability of these persons to execute the agreement by the means charged. This ability springs out of the official character with which they were invested. The charge is, that these persons, while being such officers, entered into a corrupt confederation to cheat the city by the illegal exercise of a power which they possessed as a board. * * * I perceive no defect in the indictment in this respect."

Madden *vs.* State, 57 N. J. L., 328.

In the present instance, if the prosecution were for a breach of duty, consisting in a failure to report fraudulent concerns and to recommend fraud orders against them, it would doubtless be important to ascertain with some accuracy the nature and limits of their duty in that respect, and the matter of criminal liability might, quite conceivably, be decided with reference to the mandatory or discretionary character of that duty.

In fact, however, it happens here that the averment as to duty and the assignment of its breach, as in the New Jersey case cited, are only by way of inducement to the actual charge and in explanation thereof. The fact that the defendants were such officers as they are alleged to have been, and that they had such duties as are imputed to them, are material only as tending to show what were defendants' opportunity for such wrongdoing as is charged, to explain in what way their breach of these particular duties entered into and facilitated the real offense, and to point out the criminal character of that offense.

It is manifest that in considering the charge of conspiracy to defraud or to commit misconduct in office, to be effected by suppressing or perverting reports which defendants should have made, the extent of their duty in that regard

is of little materiality. The important matter is that these defendants, being charged with certain functions concerning these cases and thereby enabled to utilize them for their own corrupt ends, availed themselves of the opportunity thus afforded to commit an ulterior offense. In this view of the case, the stringency or the laxity of their obligation to do any particular thing in respect to the reports and recommendations becomes of the slightest importance. The material fact is that the defendants occupied toward lotteries and fraudulent concerns such a relation as enabled them to exercise their official functions in the execution of a criminal conspiracy.

VI.

In No. 1396 the charge is that the conspiracy alleged was with intent to defraud the United States.

The agreement which is laid as amounting to intended fraud included:

1. A suppression of reports finding and declaring that the concerns named were fraudulent in character, at which conclusion defendants had arrived.

2. Omission to recommend fraud orders, such as were required by the statute in cases of the character which defendants conceived these to be.

3. An allowance of the free use of the mails, for an indefinite period, to the concerns which, in the judgment of the defendants, were by the statute peremptorily denied postal facilities.

4. Keeping the question as to the issue of fraud orders open to the end that Barrett might make a profit out of the matter.

5. An authoritative declaration that all existing schemes were fraudulent and must be amended.

6. The creation of an impression that only Barrett knew how to amend to the satisfaction of the Post-Office authorities.

7. An announcement to be made concurrently with the notice of the departmental decision that Barrett would be available as attorney for companies affected by his decision.

8. The refusal by Tyner to act upon any proposed amendments except such as were submitted by Barrett.

9. The advancement by these and other means of the pecuniary interest of Barrett.

10. The obstruction and prevention of the orderly and due administration of the laws.

It needs no argument to show that the scheme thus outlined involved divers breaches of official duty, the abuse of defendants' official positions and official authority for private emolument, and an arrest of the due execution of the laws.

If the United States were entitled, by reason of having entrusted the execution of their laws to the defendants, to the due and honest execution of such laws, then the United States would clearly be defrauded by the corrupt and dishonest failure of the defendants to perform those duties.

It is objected that the conspiracy alleged involved in its execution no deprivation of the United States in respect to anything of pecuniary value, and that, therefore, there would have been no fraud on the United States had the conspiracy been carried into execution.

The United States, however, as the court judicially knows from the public statutes, paid these officers certain salaries.

The consideration for such salaries was efficient and *bona fide* service in respect to their official duties. If the United

States did not receive such service; if the defendants willfully neglected to discharge their duties, or performed them in bad faith, there was certainly a pecuniary detriment to the Government in the payment of money for which it did not receive due equivalent. A servant who fails to perform his master's commands commits a fraud, although his duties may concern only domestic or social affairs which involve neither money nor other tangible property. A jailer who willfully permits a prisoner to escape defrauds the public of the honest service which is due from him, though the safe-keeping of prisoners has no pecuniary value.

Fraud is said to be Protean in its manifestations, and the courts have advisedly refrained from attempting any exhaustive definition of the term, lest human ingenuity should devise some form of deceit not covered by the definition.

There can, however, be no doubt that that is a fraud by which one person is led by deceit to do something to his disadvantage which, but for such deceit, he would not have done. In this case it will not be pretended that the United States would have permitted the defendants to carry out the scheme alleged in the indictments had the United States or their proper authorities been informed of the purpose and operation of the scheme. It is clear that the agreement as stated could not be executed except by concealing the acts and intentions of the conspirators from the knowledge of the public and of the agents of the public appointed to see to the honest and effective execution of the laws. It was requisite that the Government should be deceived, and it was intended that the Government should fail of the due and orderly administration of the laws.

That pecuniary detriment is not essential to constitute a fraud is well established.

Northrop *vs.* Hill, 57 N. Y., 354.

Pontifex *vs.* Bignold, 3 Man. & Gr., 63.

A marriage procured by deceit is an indictable offense, though not involving pecuniary loss to any one.

Com. *vs.* Waterman, 122 Mass., 57.
Wharton, Crim. Law, sec. 1362.

So of frauds upon public justice.

Wharton, Crim. Law, secs. 1333, 1380.

So of frauds involving no loss to the Treasury, but only discredit to the State.

Treves' case, East's Crown Law, 821.
Rex *vs.* Beale, 1 East, 183.
Rex *vs.* Brook, 2 Term Rep., 190.

To the same effect are the civil-service cases, in which it is held that false personation in an examination is a fraud upon the United States, although no pecuniary detriment is involved.

Colladay *vs.* Palmer, 18 App. D. C., 426.
United States *vs.* Bunting, 82 Fed. Rep., 883.
United States *vs.* Curley, 122 Fed. Rep., 185.

It is clear that in these instances and in others of like character it is not material whether or not the person defrauded suffers an actual loss. In the civil-service cases it may have been that the Government obtained better appointees and more valuable service by reason of the false personation than could have been secured had some other person been appointed in accordance with the law.

Where a jailer corruptly permits a prisoner to escape, it may be that the man is innocent and that the public is the gainer by reason of being saved the cost of keeping him and the expense of a fruitless trial. The detriment to the Government in either case consists not in the fact that it sustains a material loss, but that it fails to obtain the due and honest execution of its laws, for which it has bargained with the officer.

In this case, therefore, it is to no purpose to say that the United States suffered no loss of money or that perhaps the companies affected were not in fact fraudulent. The important fact is that the defendants were obligated to perform certain duties, which they either failed to perform or performed in bad faith, and in this way the Government was defrauded of the orderly and due administration of its laws.

VII.

That the facts alleged as the subject-matter of the conspiracy amount to the offense of misconduct in office will hardly be doubted.

It will be observed that the scheme of conspiracy alleged included a willful omission on the part of defendants to perform divers duties incumbent upon them, the intentional obstruction and perversion of the laws governing the postal service and a corrupt administration of the public affairs entrusted to them with a view to private profit.

Authorities to the effect that all these things are criminal misconduct are clear and ample:

2 Wharton, Crim. Law, secs. 1568, 1572, 1582, 1583.
2 Bishop, Crim. Law, secs. 972, 973, 974, *et seq.*
1 Bishop, Crim. Law, secs. 239, 459.
23 Am. & Eng. Encyc. Law, 382.
1 Russell on Crimes, p. 200.
7 Bacon's Abridgment, 325.

"It is an undisputed principle of the common law, that for a breach of a public duty an officer is punishable by indictment."

South *vs.* Maryland, 18 How., 402.

So also are—

Anonymous, 6 Modern, 96; 1 Salkeld, 75, 380.; 1 Keble, 933.

Rex *vs.* Buck *et al.*, 6 Mod., 306.

Rex *vs.* Bootie, 2 Burrows, 864.

Rex *vs.* Harper, 5 Mod., 96.

Rex *vs.* Mowbray, 6 Term Rep., 282.

With particular reference to the suggestions of opposing counsel that the duties assigned to defendants were discretionary in their nature, attention is invited to the following:

"It is a misdemeanor at common law for a public officer, in the exercise or under color of exercising the duties of his office, to abuse any discretionary power with which he is invested by law, from an improper motive. In such cases the existence of the motive may be inferred either from the nature of the act or from the circumstances of the whole case."

Wharton, Crim. Law, sec. 1572.

The common-law offense of misconduct in office is recognized in Maryland, and was held to have been committed by a justice of the peace in failing to pay over to the party entitled certain money taken from a prisoner brought to trial before him. In this case it was held—

"immaterial whether the law imposed upon him the duty to receive the property; it was received by him under color of his office, if not *virtute officii*, and there can be no doubt of his legal obligation to restore it to the person entitled."

Hiss *vs.* State, 24 Md., 556.

It is not understood that counsel for appellants deny that the facts charged amount to the common-law offense of misconduct. Their reliance appears to be upon the contention that section 5440, Revised Statutes of the United States, denouncing conspiracy to commit any offense against the

United States, does not extend to offenses existing by reason of the common law in force in the District of Columbia.

There is no doubt that the common law is in force in this District by virtue of the act of 1801 and the Code, and that under that statute all offenses created by the common law are punishable here as offenses against the United States.

De Forrest *vs.* United States, 11 App. D. C., 458.

Common-law offenses committed in the District of Columbia being, therefore, offenses against the United States, are clearly within the very words of the statute, section 5440. It would be difficult to read into the statutory text any tacit exception excluding such offenses on the mere ground that they are of common-law origin, or to raise an arbitrary distinction, in the construction of the act, between common-law offenses and offenses of other creation. It is plain that nothing in the statute affords any warrant for such a distinction, and to limit the section to offenses created by other Federal statutes than the act of 1801 would be to engraft a purely gratuitous qualification upon that provision made by Congress.

It is suggested that section 5440 must be understood as contemplating only offenses that are made so by Federal statutes of general application and are offenses against the United States as a nation and not as the local sovereignty in the District of Columbia. Such a distinction, it will be perceived, is purely arbitrary and can be based upon nothing in the statute or elsewhere, so far as has been indicated.

It is no doubt true that to hold the section applicable to the District will render some things criminal if done here which would not be so if done elsewhere; but there is nothing unusual or irregular in such a diversity of Federal law, whether criminal or civil. Congress has often made provisions limited in their application to the District of Columbia, or to the forts, dock yards, and reservations of the United States, or to the Territories, or to one or more

particular Territories. In the creation of this District different bodies of law were provided for the two counties, the existing Maryland law for Washington county and the existing Virginia law for Alexandria county. There has recently been enacted a special code of law for the Territory of Alaska. At an earlier date Congress adopted the Code of Oregon and put it in force in Alaska, and at the same period the Code of Arkansas was in force in Oklahoma by virtue of a like adoption and was administered as Federal law.

Leak, &c., Co. *vs.* Needles, 69 Fed. Rep., 68.

Thus it happens that the laws of the United States differ in different regions governed by Congress. What is an offense in Alaska may not be so in Oklahoma, and it may be criminal to do certain things in Arizona which would be innocent if done in a Federal arsenal or dock yard. The fact that it is an offense to sell liquor within an Indian reservation does not argue that it is, or should be, unlawful to do so in the the District of Columbia.

It therefore proves nothing to point out that, under section 5440, certain offenses are the subject of unlawful conspiracy in this District which are not so elsewhere. It may well be that Congress, taking into consideration the fact that so many public officers, holding particularly high and important trusts, were congregated in the District of Columbia, regarded it as desirable that peculiarly stringent provision, of only local application, should be made for the seat of government. At any rate, whatever be the reason or want of reason, the fact remains that the statute does operate to make conspiracies to commit common-law offenses punishable in this District, which is not so elsewhere.

It may be true that the statute, as thus applied, makes it an offense of considerable gravity to conspire to commit any one of many petty crimes, and that there is some apparent unreason in this making a mere conspiracy to do a thing punishable more severely than to do a thing agreed to be done.

To this objection it may be answered that something may and must be left to the discretion and good faith of the courts in the administration of the laws, and the public authorities may be trusted not to make the execution of such provisions oppressive or ridiculous. To all general laws, criminal as well as other, applies the maxim, *De minimis non curat lex:* 1 Bishop, Crim. Law, sec. 213.

So far as the power of Congress is concerned, it has been decided that it is competent for that body to provide a graver punishment for conspiracy to commit an offense than for committing the offense to which the conspiracy is directed.

Clune *vs.* United States, 159 U. S., 590.

It should be added that, even were the statute held inapplicable in this District, the common law itself, which is concededly in force here, makes a conspiracy to commit a common-law crime an offense.

Where the common law obtains, a common-law offense is not abolished by, or merged in, a statutory offense of the same character.

State *vs.* Norton, 23 N. J. L., 33.

If, therefore, the statute be eliminated from consideration, the indictment may still be sustained under the common law, as for a conspiracy to commit an offense at common law.

It is accordingly submitted that the judgment rendered below in each of these cases should be affirmed.

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